

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA

Plaintiff,

-vs-

10-CV-569A

MARK E. ZUCKERBERG,
FACEBOOK, INC.,

Defendants.

Proceedings held before the
Honorable Leslie G. Foschio,
U.S. Courthouse, 2 Niagara Street,
Buffalo, New York on April 4, 2012.

APPEARANCES:

DEAN BOLAND, ESQ.,
SANFORD DUMAIN, ESQ.,
ROBERT CALIHAN, ESQ.,
PETER SKIVINGTON, ESQ.,
STEVEN TEPPLER, ESQ.,
Appearing for Plaintiff.

ORIN SNYDER, ESQ.,
ALEX SOUTHWELL, ESQ.,
AMANDA AYCOCK, ESQ.,
TERRANCE FLYNN, ESQ.,
THOMAS DUPREE, ESQ.,
MATTHEW BENJAMIN, ESQ.,
Appearing for Defendants.

AUDIO RECORDER: Sandra Wilson

TRANSCRIBER: Michelle L. McLaughlin, RPR,
Official Reporter,
U.S.D.C. W.D.N.Y.
716/332-3560

(Proceedings recorded by electronic sound
recording, transcript produced by computer.)

1 THE CLERK: On the record, Ceglia versus
2 Zuckerberg and Facebook. Appearing for the
3 plaintiff are Dean Boland, Sanford Dumain.

4 MR. DUMAIN: Good afternoon, your Honor.

5 THE CLERK: Robert Calihan, Peter
6 Skivington and Steven Teppler.

7 Appearing for the defendants are Orin Snyder.

8 THE COURT: Excuse me. Mr. Skivington,
9 why are you seated in the back area?

10 MR. SKIVINGTON: I've come to sit with the
11 parents. If that's all right with the Court, I'll
12 be happy to sit up there.

13 THE COURT: Oh, with the parents. The
14 parents of --

15 MR. BOLAND: My client's parents, your
16 Honor, Mr. and Mrs. Ceglia.

17 THE COURT: Why would he need to be seated
18 with the parents if he's counsel of record?

19 MR. BOLAND: Well, I didn't have any role
20 in that.

21 THE COURT: If you're going to -- we're
22 hoping that you'd participate since you're a new
23 counsel, and so we want you front and center.

24 MR. SKIVINGTON: Thank you, your Honor.

25 THE COURT: Maybe there's an extra chair

1 you can pull up to counsel's table instead of
2 sitting -- I didn't realize that there weren't
3 going to be enough chairs. Pull up a chair, make
4 yourself comfortable. There's another one back
5 there if somebody needs another one.

6 We've had the pleasure of I think -- I think
7 we've had the pleasure of Mr. and Mrs. Ceglia's
8 company in the past, so I don't know that they need
9 counsel to comfort them here during the
10 proceedings.

11 Okay. Who was the last one Mr. McEvoy, Sandra?

12 THE CLERK: No, Mr. McEvoy is just a
13 litigation support from the law firm of Milberg.
14 He might be speaking too.

15 THE COURT: Okay.

16 THE CLERK: Appearing for the defendants
17 Orin Snyder, Amanda Aycock, Terrence Flynn, Alex
18 Southwell and Thomas Dupree and Matthew Benjamin.

19 We're here on a Rule 16(b) hearing and also a
20 hearing on defendants' motion to stay discovery.

21 THE COURT: It's your motion, Mr. Snyder.

22 MR. SNYDER: Thank you, your Honor. Good
23 afternoon.

24 THE COURT: Good afternoon. Use the
25 podium. I'm assuming you would like to stand and

1 deliver as you usually do.

2 MR. SNYDER: Thank you, your Honor. I
3 appreciate it. Your Honor, last June, more than
4 nine months ago, I stood before this court in the
5 old courtroom I think on Court Street, and at that
6 time the defendants asked your Honor to order
7 targeted expedited discovery based on a fraction of
8 the evidence before the Court today, but enough
9 evidence to provide a substantial basis for
10 demonstrating that the Work for Hire document
11 attached to the complaint is a forgery, that the
12 purported emails quoted in the amended complaint
13 are fabrications, and on that basis your Honor,
14 over Ceglia's opposition, ordered targeted
15 discovery.

16 And at that time I told your Honor exactly what
17 we envisioned. That expedited discovery that was
18 narrowly targeted to confirm the inauthenticity of
19 the Work for Hire document would yield further
20 corroborating, confirmatory evidence of the fraud.
21 I told your Honor that our experts, upon
22 examination of the original document and
23 Mr. Ceglia's computers and electronic media would
24 conclusively prove that this plaintiff is
25 perpetrating a fraud on the Court. I told your

1 Honor at that time that we would file a motion to
2 dismiss the lawsuit pursuant to the inherent power
3 doctrine, which, of course, empowers this Court to
4 exercise a critical gatekeeping function that
5 protects courts, juries, and our judicial system
6 from becoming in the words of the United States
7 Supreme Court, quote, "mute and helpless victims of
8 deception and fraud."

9 Your Honor granted that motion ordering
10 targeted expedited discovery designed to test the
11 authenticity of the Work for Hire document, the
12 so-called emails, all of which Mr. Ceglia had
13 access to, continued to have access to for the past
14 nine months and have access to prior to the
15 commencement of this fraudulent lawsuit.

16 Now, what happened during the next nine months
17 was nothing less than extraordinary. First, of
18 course, the Court ordered discovery. When I say
19 over the plaintiff's opposition, he wanted
20 so-called reciprocal discovery, broad discovery,
21 Mr. Zuckerberg's deposition, access to Facebook's
22 computers, the whole kit and caboodle. And on a
23 fraction of the evidence before this Court, your
24 Honor said no, it needs to be targeted to core
25 issues of fraud in the case.

1 What happened next your Honor is aware of.
2 Smoking gun forensic proof, objective proof of the
3 fraud. First and foremost, we found the authentic
4 contract on both the plaintiff's hard drive and the
5 hard drive of the international law firm Sidley and
6 Austin where it has sat since March of 2004. And
7 because that's an authentic contract that's existed
8 in the real world for many, many years, his Work
9 for Hire document must be necessarily a forgery,
10 because the one thing the parties agree on is that
11 there's only one contract that is real. It's
12 either the Work for Hire document or the StreetFax
13 contract. To this date --

14 THE COURT: Just to clarify, on the second
15 page of the StreetFax contract is -- with the
16 signatures, I mean, that's part of the StreetFax
17 contract, correct?

18 MR. SNYDER: They match up, yes. Yes,
19 they are.

20 THE COURT: Well, I mean, that's it.
21 That's what I was found on the drive.

22 MR. SNYDER: Yes, your Honor.

23 THE COURT: There's never been an original
24 of it discovered so far?

25 MR. SNYDER: Correct. At the outset of

1 the case we informed the Court that Mr. Zuckerberg
2 does not have and did not keep since his freshman
3 year at Harvard many things that he had as a 18- or
4 19-year-old in college including the original of
5 the contract. But I did tell your Honor that if we
6 had access to his computers, and remember he hid
7 the Seagate computer from this Court. He lied to
8 this Court when he committed a sworn document, lied
9 to this Court in sworn statements concealing the
10 Seagate computer because it had the StreetFax
11 contract on it.

12 THE COURT: Is that the one that was lost
13 as well?

14 MR. SNYDER: No, what was --

15 THE COURT: The large hard drive.

16 MR. SNYDER: What was lost, we say
17 spoliated, were the USB devices containing page 1
18 and page 2 of StreetFax contract.

19 THE COURT: Yes, but there was a larger --
20 there was a larger hard drive that was lost too.

21 MR. SNYDER: I don't think so, your Honor.
22 It was the USB devices that were destroyed.

23 THE COURT: Okay. Just the USB.

24 MR. SNYDER: Or spoliated.

25 THE CLERK: Now, what I'm getting at is

1 the StreetFax document is -- it's not denominated
2 in any of the papers as a contract. It just said
3 StreetFax on it, correct?

4 MR. SNYDER: It's a written instrument
5 signed by both parties.

6 THE COURT: I know that. But we refer to
7 it as StreetFax contract --

8 MR. SNYDER: I do, because it's an
9 agreement.

10 THE COURT: Yes, but that's not the
11 labeling on the document.

12 MR. SNYDER: It Says StreetFax --

13 THE COURT: That's my point.

14 MR. SNYDER: And it is without question,
15 yes, a legal instrument that is a contract or
16 agreement. Yes, your Honor.

17 THE COURT: I'm not focusing on that. I'm
18 just focusing on the actual physical appearance of
19 the document.

20 MR. SNYDER: Correct, your Honor.

21 THE COURT: And my next question is -- and
22 why I'm still a little fuzzy on this, I don't know
23 after reading all these papers -- is it your
24 contention that the Work for Hire document contract
25 is a fake both as to the first page and the second

1 page which contains the signatures, or is the
2 second page actually a copy, mirror copy?

3 MR. SNYDER: It appears to be --

4 THE COURT: M-I-R-R-O-R.

5 MR. SNYDER: Yes. It appears --

6 THE COURT: Of the -- excuse me, StreetFax
7 contract.

8 MR. SNYDER: Yes. Page 2 appears to be
9 either an exact duplicate of the authentic real
10 page 2 of the StreetFax contract or a near perfect
11 facsimile. But it appears to be a duplicate. Of
12 course we were not there when Mr. Ceglia and his
13 cohorts fabricated the document. And, of course,
14 when we talk about the Work for Hire document, we
15 now know forensically, objectively, scientifically
16 that during the course of this lawsuit Mr. Ceglia
17 created a second version of the Work for Hire
18 document, which I'll get to in a moment.

19 THE COURT: Which is the one he turned
20 over, not the one that's attached to the amended
21 complaint.

22 MR. SNYDER: Yes, and the leading
23 handwriting expert in the world, who the United
24 States government hires for their most important
25 cases, because they don't have someone in-house as

1 good, found 20 points of difference. One is enough
2 like a fingerprint. He has 20. That, standing
3 alone, is the most egregious fraud before your
4 Honor when we were in the well of this court. This
5 man created a second version of the document he is
6 suing on.

7 THE COURT: Question is why? Why would he
8 do that?

9 MR. SNYDER: Because he needed to create
10 another version to bake. Let me get to that in a
11 moment, your Honor.

12 THE COURT: He didn't attach the original
13 to the amended complaint.

14 MR. SNYDER: No, he attached a copy.

15 THE COURT: Correct.

16 MR. SNYDER: But he was test --

17 THE COURT: There is no original.

18 MR. SNYDER: Well, he has the original.
19 He has presumably two originals.

20 THE COURT: Your argument is that the
21 document that was turned over for inspection in
22 July that was baked is the original?

23 MR. SNYDER: Is a different version of the
24 original that he used to copy what he attached to
25 the complaint. They're two separate documents.

1 THE COURT: That's exactly my point.

2 MR. SNYDER: Yes.

3 THE COURT: But we've never seen the
4 original. We don't have the original.

5 MR. SNYDER: The first original we don't
6 have. The second original we've all examined. Now
7 what's extraordinary --

8 THE COURT: No, it's a copy.

9 MR. SNYDER: But we all have inspected the
10 original that Mr. Argentieri produced in July.

11 THE COURT: And you're saying that was
12 recently fabricated.

13 MR. SNYDER: I'm saying that it has been
14 scientifically determined that that is a different
15 document than the document, a copy of which is
16 attached to the complaint. There's no question
17 about that. Now, to this day, either Ceglia --

18 THE COURT: Why would he do that?

19 MR. SNYDER: What's that?

20 THE COURT: Why would that be?

21 MR. SNYDER: This is a man who was
22 manipulating --

23 THE COURT: Why would you take the
24 original of the copy that's attached to the
25 complaint and bake it if you were going to bake it,

1 rather than create another instrument and bake it?

2 MR. SNYDER: If you want me to speculate
3 about the criminal mind, I can speculate. For
4 example, he wanted to obviously he baked or
5 subjected the document he gave us to light
6 treatment to bake it and create an aged appearance,
7 and he had the first fabricated document that
8 Mr. Argentieri had in the safe deposit box that he
9 gave a copy of to his experts, and he wanted to
10 test the baking on a new original document. Before
11 we know, there's a third and fourth and fifth and
12 sixth and seventh sitting in a drawer somewhere.

13 THE COURT: Well, according to Stroz
14 Friedberg, there were test forgeries --

15 MR. SNYDER: Correct.

16 THE COURT: -- floating around that
17 suddenly got discovered as well.

18 MR. SNYDER: Correct. To this day either
19 Mr. Ceglia or any of his lawyers, including his
20 newest ones, have been willing to submit a sworn
21 declaration, much less anything certified under
22 Rule 11, and we've sent them all Rule 11 letters,
23 your Honor, denying the authenticity of the
24 StreetFax contract. Incredibly, your Honor, if you
25 read the 17-page opposition brief cataloging a

1 laundry list of supposed fact issues, it doesn't
2 mention -- it doesn't mention much less deny or
3 dispute the authenticity of the StreetFax contract.

4 All we've heard is one of the newest lawyers
5 saying to a national newspaper incredibly, not
6 pursuant to Rule 11, not in this Court making a
7 representation to your Honor, that Mr. Zuckerberg
8 planted the StreetFax contract after hacking into
9 the plaintiff's computer and presumably scanning it
10 on to his computer and presumably in 2004, who
11 knows when, emailing it to Sidley Austin. I
12 challenge any of the lawyers in this courtroom to
13 make that representation to your Honor that they
14 have a good-faith basis in law or fact for that
15 assertion which is preposterous, defamatory, and
16 false.

17 And let me tell you something, your Honor, you
18 do not get discovery, you do not get to first base
19 based on the martians have landed kind of
20 allegations. It's no different than a bank robber
21 saying it wasn't me on the photo. It wasn't my
22 fingerprints. The martians invaded my body, and it
23 was the martians. This is as fantastical an
24 allegation supported by not a shred of evidence.

25 THE COURT: You don't believe in cyber

1 fairies?

2 MR. SNYDER: I don't I believe in cyber
3 fairies or little blue monsters in 2004 not only
4 scanning on to Mr. Ceglia's computer the StreetFax
5 contract, but then emailing a Mr. Kole, where
6 there's no evidence they even knew who Mr. Kole
7 was.

8 THE COURT: Mr. Lake made this assertion
9 originally, didn't he?

10 MR. SNYDER: Mr. Lake did. But
11 Mr. Lake --

12 THE COURT: In court in the old
13 courthouse.

14 MR. SNYDER: He did. And we will remember
15 that statement in court that he made.

16 THE COURT: I'm just pointing out that
17 it's not the first time we've heard it, and it was
18 on the record.

19 MR. SNYDER: No. And the reason, your
20 Honor, we didn't make this motion in September, as
21 your Honor is aware which we devoutly wanted to do
22 --

23 THE COURT: The point is that Mr. Lake's
24 assertion was never followed up on by the
25 plaintiff.

1 MR. SNYDER: Never followed up by the
2 plaintiff, and more over there is not a shred of
3 evidence to support that speculation. It would be
4 like saying if the murder weapon was found in the
5 defendant's possession, accusing, without any
6 basis, some other party of planting the evidence,
7 without a shred of support, and the law does not
8 allow parties to make irresponsible allegations.

9 Now, of course, the critical point here, maybe
10 the Milberg firm knows this, maybe they don't.
11 When he concealed the Seagate hard drive for the
12 purpose of defrauding this Court and my client,
13 meaning not telling us the truth that this contract
14 existed, which irresponsibly was not in the DLA
15 complaint either. Of course DLA is out of the
16 case. What did Mr. Ceglia swear to this Court and
17 Mr. Argentieri, who's not here either today. I
18 don't know where he is.

19 THE COURT: Where is Mr. Argentieri,
20 Mr. Boland?

1 MR. BOLAND: Oh, no. He's fully aware.

2 He's getting all the ECF notifications as well.

3 THE COURT: I see.

4 MR. SNYDER: So --

5 THE COURT: What is he doing in
6 California?

7 MR. BOLAND: I'm not sure what the
8 conflict was, your Honor. I can find out and have
9 him communicate to you.

10 THE COURT: In a case of this magnitude he
11 had a conflict he couldn't resolve in favor of
12 being here?

13 MR. BOLAND: I don't know if it was
14 personal or not, I'm not sure.

15 THE COURT: He certainly hasn't notified
16 the Court about his unavailability, has he, Sandra?

17 THE CLERK: No, Judge.

18 MR. BOLAND: We have several other able
19 counsel here to assist me, your Honor, so I think
20 that nothing -- it won't hold the Court back.

21 THE COURT: Well, I wasn't suggesting
22 otherwise. I was just suddenly surprised to
23 realize he wasn't here.

24 MR. BOLAND: I assure you, your Honor, we
25 won't hold anything back by the fact that he's not

1 here. We'll keep it moving forward for you.

2 THE COURT: I don't think that's the
3 point, Mr. Boland.

4 MR. BOLAND: Very well.

5 THE COURT: Go ahead.

6 MR. SNYDER: Of course, your Honor, the
7 question is whether able counsel appearing before
8 this Court noticing appearances in this matter are
9 aware that Mr. Ceglia, when he was caught
10 red-handed with the Seagate hard drive with the
11 contract that no one disclosed on this side to the
12 court, but we new existed. We told your Honor day
13 one Mark Zuckerberg signed a StreetFax contract.
14 We didn't know we were going find it on his
15 computer. We thought we might, and he tried to
16 hide it from the Court. And what did he say when
17 he was caught? He said I sent that email to James
18 Kole. He was my lawyer.

19 Your Honor, it is privilege and confidential,
20 do not show it to the other side. Did he say that
21 anyone planted it? No, he didn't. So he was
22 either lying to your Honor at that time under oath
23 committing perjury, or today his lawyers to the
24 Wall Street Journal, maybe to this court, are
25 misrepresenting the facts or asserting facts

1 without a shred of evidence which directly
2 contradicts their client's sworn testimony to your
3 Honor that this was a communication that he sent to
4 his lawyer. It can't be both.

5 Now we're here, your Honor, nine months later,
6 and it is the height of cynicism that these lawyers
7 accuse us of delay. We have spent 20 hours with
8 your Honor. And we appreciate your Honor's time
9 and thoughtfulness on five motions to compel. We
10 wanted to move to dismiss in September. We
11 couldn't because at every turn this plaintiff and
12 his lawyers obstructed the court-ordered discovery
13 in acts of defiance and obstruction that in and of
14 themselves, not only constitute independent grounds
15 for dismissal, but in our judgment are paradigmatic
16 grounds for Rule 37 dismissal of this case. That's
17 the -- I don't know if it's Roman two or Roman
18 three of our motion to dismiss. Five separate
19 motions requiring hundreds of pages of briefing
20 consuming more than 15 hours of hearings,
21 Mr. Benjamin points out, all of which we believe
22 parenthetically the plaintiffs and the law firms
23 that have represented him are responsible under
24 Rule 11.

25 Incidentally, Mr. Ceglia hasn't paid the

1 \$75,000 in fees that this Court awarded more than
2 six weeks ago. But we're here, your Honor,
3 because -- nine months later, because it took us
4 five trips to make this plaintiff compliant, and he
5 still hasn't complied.

6 Let me tell your Honor something that we
7 haven't spelled out --

8 THE COURT: Hasn't complied with?

9 MR. SNYDER: Yet he's still in defiance of
10 your Honor's orders.

11 THE COURT: I thought we cleared up those
12 problems with the supplemental declarations. I was
13 going to ask you about that.

14 MR. SNYDER: No, your Honor.

15 THE COURT: Go ahead. Go ahead.

16 MR. SNYDER: I'm not sure if the Milberg
17 firm is aware of this either. On April 2011, this
18 plaintiff created an email account
19 getzuch@gmail.com, referring to Mark Zuckerberg.
20 Get zuch. He failed to disclose that to your Honor
21 in his sworn declaration on August 29th, 2011. He
22 lied to this Court, one of multiple lies.

23 THE COURT: But didn't he file some
24 supplemental declarations pursuant to my recent
25 D and O that granted your motion in both respects?

1 MR. SNYDER: Yes, but let me tell, your
2 Honor, what happened in the interim.

3 THE COURT: Okay.

4 MR. SNYDER: On January 28th, 2012, before
5 Stroz Friedberg found this account, he deleted all
6 of its content. Deleted it, everything in the
7 account during the pendency of this lawsuit,
8 getzuch@gmail.com. It was only after Stroz
9 Friedberg identified it, and then he played games
10 with us and failed to get us the forms for a long
11 time with more -- more dog-ate-my-homework kind of
12 excuses that we got it, and like the Seagate
13 computer and everything else he withheld, and the
14 reason we were so dogged for five motions to compel
15 is we knew that every time this criminal plaintiff
16 was hiding evidence, it was because there was more
17 under the rock to find, and that's what happened
18 with the get zuch email. And it's what happened --

19 THE COURT: Did you discuss that deletion
20 in your spoliation argument?

21 MR. SNYDER: It's in the Stroz Friedberg
22 report, your Honor.

23 THE COURT: Oh.

24 MR. SNYDER: Now, of course -- so the
25 spoliation, which I'm not going to go through and

1 document, is an independent grounds for -- for
2 dismissal, and certainly a stay. And I've
3 litigated, your Honor, the question of spoliation,
4 many times under the Zubulake. In fact, Mr. Dupree
5 and I were just in the Appellate Division in New
6 York on that issue. And to say that this is a
7 clear case for spoliation dismissal is an
8 understatement. It is difficult to imagine a
9 series of facts here, not only authorizing the
10 Court to dismiss based on the litigation misconduct
11 here, all of which is cataloged in our papers.

12 But making this a case not only would the
13 Second Circuit summarily affirm dismissal here, but
14 it would be a fact pattern that would be so
15 egregious that I --

16 THE COURT: You know it's dangerous to
17 predict how appellate courts will rule.

18 MR. SNYDER: Well, this one --

19 THE COURT: Or any court for that matter.

20 MR. SNYDER: You know, your Honor, this is
21 the equivalent of the confession, the videotape,
22 the eyewitness, the fingerprints, and the DNA, and
23 then some more evidence that I can't think of.
24 It's difficult to imagine -- if someone presented
25 this fact pattern in law school, the students would

1 think it was make believe. No one could be this
2 abusive of the judicial system, lawyers, and
3 litigant, because, of course, the lawyers who
4 withdrew from the case previously told your Honor
5 that their client, Mr. Ceglia, instructed them to
6 obstruct your Honor's orders, and then withdrew
7 from the case, promptly causing the sanction.

8 Now, your Honor, we're here today -- that's the
9 background. And we're here today of course --

10 THE COURT: The Milberg is a distinguished
11 firm of course.

12 MR. SNYDER: I don't know -- I don't know
13 whether they're a distinguished firm.

14 THE COURT: You don't know the firm at
15 all?

16 MR. SNYDER: I know the firm well.

17 THE COURT: Well --

18 MR. SNYDER: I know they are a law firm.

19 THE COURT: -- how could you know them if
20 they weren't distinguished? You only deal with
21 distinguished law firms, right?

22 MR. SNYDER: I would prefer not to
23 comment.

24 THE COURT: Okay. In any event, the point
25 is their position is that their client's entitled

1 to his day in court.

2 MR. SNYDER: Yes. They're wrong --
3 they're entitled to his day in court. They've had
4 their day in court for nine months. They're going
5 to have their day in court today. They have an
6 opportunity to oppose our motion to dismiss, and
7 they have had access to all the evidence that is
8 necessary to review before we did.

9 Your Honor's expedited discovery order simply
10 put us on equal footing where the plaintiff was
11 before he filed this lawsuit. But I'll address
12 that in a moment, your Honor.

13 I just want to make this point.

14 THE COURT: Before -- well, we don't know,
15 because we never I think have discussed it with
16 Mr. Boland directly, or for that matter Mr. Lake
17 when he was in the case, as to what extent the
18 plaintiff's own crew of experts have delved into
19 the issues more profoundly than your experts have.
20 We don't even know, or do we?

21 MR. SNYDER: Well, let me --

22 THE COURT: We'll find out.

23 MR. SNYDER: I do know, and if they
24 didn't, they've had years to do it presumably. But
25 beyond that, I do know and can represent to this

1 Court that the DLA Piper law firm, before filing
2 the amended complaint, knew or should have known
3 about all of the evidence -- let me withdraw. Knew
4 or should have known of a substantial amount of the
5 evidence that we present in our motion to dismiss,
6 and failed to present that to the Court in the
7 complaint. And presumably the Milberg firm knows
8 that as well. That's for a different day, your
9 Honor.

10 The point is we know that their team of experts
11 examined the document that Mr. Argentieri pulled
12 out of his envelope in July. We know that their
13 experts say January of 2011, we're reviewing the
14 computers, and everything -- everything else.

15 So we're here today, your Honor, because the
16 Court expedited discovery, served its precise
17 intended purpose. This is a case study, your
18 Honor, and will be for years I think for litigants
19 across the country for when expedited discovery is
20 necessary and appropriate. Because what it did is
21 it produced the additional evidence, forensic
22 evidence of the fraud.

23 But for today the Court need not decide our
24 motion to dismiss in order to grant a stay. In
25 order to stay we call plenary discovery which is

1 the abusive, wide-ranging fishing expedition that
2 they want to subject my clients to in the face of
3 this fraud to extract the settlement that all their
4 documents make clear is their design here. In
5 order to stay plenary discovery and defer entry of
6 a scheduling order, the Court need only conclude
7 that our motion to dismiss had substantial
8 grounds.

9 If we had substantial grounds in 2011 when your
10 Honor ordered expedited discovery, we have
11 substantial grounds times ten today. This is not a
12 close question. Rule 26 --

13 THE COURT: I don't think I found that. I
14 think that --

15 MR. SNYDER: Good cause.

16 THE COURT: Whatever, colorful basis,
17 something like that.

18 MR. SNYDER: I think it was good cause.

19 THE COURT: Sure.

20 MR. SNYDER: Rule 26 gives this Court
21 broad discretion.

22 THE COURT: Perhaps a little less than
23 substantial basis, or do you think they're the
24 same?

25 MR. SNYDER: You know, your Honor, the

1 test is stated as substantial grounds or -- it's in
2 the disjunctive -- does not appear to be without
3 foundation in law. So I think --

4 THE COURT: Pretty forbearant standard.

5 MR. SNYDER: I think it's a flexible
6 standard that gives the Court the broad discretion
7 as the fact finder that is appropriate. And so
8 your Honor has the broadest of discretion here
9 that -- that turns on a balancing of well known
10 factors that your Honor in the Steuben Foods
11 case -- it's actually a leading case in the
12 circuit.

13 THE COURT: Steuben.

14 MR. SNYDER: Steuben.

15 THE COURT: As in Steuben glass.

16 MR. SNYDER: Yes.

17 THE COURT: After the Baron. That's
18 why -- that's why my courtroom is named after
19 Wyoming county.

20 MR. SNYDER: I'm from Manhattan, your
21 Honor.

22 THE COURT: I know, that's why I'm trying
23 to educate you.

24 MR. SNYDER: Named after --

25 THE COURT: We were in the Big Apple

1 recently, my wife and I, for a wonderful vacation
2 trip.

3 MR. SNYDER: Named after the Mannahatta
4 Indian, Native Americans.

5 THE COURT: By the way, if I sound a
6 little horse, it's because my son and I attended a
7 certain hockey game last night.

8 MR. SNYDER: Yes.

9 THE COURT: And on to the Rangers.

10 MR. SNYDER: So the balancing of the
11 factors, you know, whether dispositive motion is
12 pending --

13 THE COURT: Excuse me, Philadelphia.

14 MR. SNYDER: Yes. Whether a dispositive
15 motion is pending, of course, it is, and if so, its
16 strength. Here we say not only do we have
17 substantial grounds and foundation in law, but a
18 motion to dismiss that is powerful, and --

19 THE COURT: Could I ask you a question
20 about the -- one of the expert's points. This is
21 rather technical. The specification referred to by
22 Professor Tytell, the six-page specification, I was
23 intrigued by his analysis of the signature on the
24 signature line which co-dates -- or is of the same
25 date as the purported Work for Hire instrument.

1 And pointing out that the ink seems to be
2 substantially different. And I'm just wondering
3 why you didn't allude to that in your analysis.
4 It's not discussed in either Mr. Southwell's
5 excellent executive summary, nor in your brief.

6 MR. SNYDER: Miss Aycock tells me because
7 it is purportedly confidential, meaning the
8 plaintiff, for some reason --

9 THE COURT: Well, the substance is, but
10 not the point of the signatures.

11 MR. SNYDER: For some reason the
12 plaintiff -- my team tells me we were --

13 THE COURT: Overcautious.

14 MR. SNYDER: We were overcautious because
15 of what we thought was inappropriate
16 confidentiality designation --

17 THE COURT: Yeah, but you already alluded
18 to it in his report, which was published to me,
19 wasn't it, or were those redacted out?

20 MR. SNYDER: All redacted.

21 THE COURT: Oh, okay.

22 MR. SNYDER: That's the only reason.

23 THE COURT: Okay.

24 MR. SNYDER: So, your Honor. The second
25 factor is the extensiveness of the discovery sought

1 and the burden of the discovery. And the third, of
2 course, is the prejudice.

3 So, in terms of the grounds, we have four
4 separate independent grounds for dismissal,
5 inherent power, dismissal for fraud on the Court,
6 and let me just address the question of fact
7 finding.

8 Of course, your Honor is required to find facts
9 in determining whether under its inherent power
10 dismissal is warranted. That's the very point. It
11 doesn't transform this into a Rule 56 motion. The
12 function of the Court as the gatekeeper to protect
13 this great judicial system of ours is to find facts
14 to determine whether we and your Honor and the
15 public are victims of fraud. And so if you look,
16 for example, at the Shangold case, which is --

17 THE COURT: I'm familiar with those cases.
18 You don't have to go through them. The question I
19 had under my query regarding Federal Rule of
20 Evidence 1008 subdivision A was this, and that is I
21 didn't see any cases cited where the issue was
22 related to -- I didn't see any cases in your
23 discussion of the inherent power where the court
24 was confronted with -- where any court discussed
25 whether or not that rule of evidence pertains,

1 regardless of whether or not the contract at issue
2 was a purportedly a fraud.

3 MR. SNYDER: I think that -- perhaps
4 because although it was -- it was a provocative
5 question that your Honor posed, it is apples and
6 oranges, because Rule 1008 is a component, of
7 course, of the best evidence rule, which is a trial
8 evidence rule, and necessarily we believe does not
9 apply in the context of motion to dismiss, which is
10 why no court has ever interpreted the rule to limit
11 a court's inherent power. If it did limit the
12 court's power to dismiss a lawsuit as a fraud, then
13 the inherent power doctrine would be substantially
14 circumscribed, and it is why in the context, for
15 example, of motions for sanctions the courts across
16 the country have held that playing that important
17 function of gatekeeper policing conduct before the
18 Court, the Court is not restricted by the Federal
19 Rules of Evidence.

20 THE COURT: Just, I note -- I read
21 carefully Judge Wholes hobbles -- I'm
22 pronouncing -- interesting decision in the DAG
23 Jewish Directories case you cited.

24 MR. SNYDER: Yes.

25 THE COURT: And that, of course, was a

1 contract that was at issue.

2 MR. SNYDER: Yes.

3 THE COURT: And he found it to be
4 fraudulent and threw the case out.

5 MR. SNYDER: Yes.

6 THE COURT: But the rule of evidence issue
7 didn't arise, that's my point.

8 MR. SNYDER: Right. I think it didn't
9 arise because it was in a pretrial setting, and
10 under the courts inherent powers, so it was
11 inapplicable.

12 THE COURT: So you don't see that rule
13 as -- as Congress's statement that whenever there's
14 an allegation of fraudulent contract, it's a
15 question for the jury?

16 MR. SNYDER: I think that --

17 THE COURT: Vel non.

18 MR. SNYDER: I think that that's an
19 impossible reading of the rule in light of the
20 Second Circuit and Supreme Court's precedent
21 authorizing, empowering, and commanding trial
22 courts in the federal court system to police fraud
23 and dismiss cases based on fraud, which in many
24 contexts, requires fact finding, and in some
25 instances fact finding --

1 THE COURT: Directed to a purported
2 contract.

3 MR. SNYDER: Fact finding concerning a
4 purported contract. And, of course, it is a -- one
5 of the -- it is not an uncommon modus operandi of
6 litigation fraud. I mean, there are different
7 species of litigation fraud, bribing witnesses,
8 fabricating documents.

9 THE COURT: Yes.

10 MR. SNYDER: And fabricating contracts
11 certainly is a popular one. Now, your Honor -- so,
12 on the first element, plaintiff fails miserably to
13 show that a stay is not warranted. Firstly, they
14 blatantly -- and maybe it was a typo, I don't know.
15 I don't know who wrote the brief. Maybe
16 Mr. Argentieri is writing the briefs in California.
17 I don't know. But they blatantly misstate the
18 legal standard in a signed pleading that they filed
19 in opposition to our motion. They say that -- that
20 the dispositive motion must be, quote, certain to
21 prevail. Well, that is an untrue statement of the
22 law, as this Court well knows.

23 THE COURT: Where do they say that?

24 MR. SNYDER: They do. Document 345.
25 (indiscernible).

1 THE COURT: Where is that in your papers?

2 MR. SNYDER: On page 10.

3 THE COURT: Is that the quotation?

4 MR. SNYDER: They cite -- interesting they
5 cite a -- no, your Honor. They mischaracterize the
6 Eastern District of California case, Eastern
7 district of California case. First of all, they
8 miss -- first of all, they cite a case out of the
9 district, even though they knew or should have
10 known that the Second Circuit binding, controlling
11 Second Circuit and Southern District -- and Western
12 District authority, and then failing to cite
13 relevant cases, they then distort the
14 out-of-jurisdiction case they cite, and I have not
15 studied Ninth Circuit law recently on this point.
16 For all I know it's different. I haven't studied
17 it. I don't think it's important whether it is or
18 isn't different, because the Second Circuit's
19 rule --

20 THE COURT: I see your point. They then
21 go on to pair -- not paraphrase but echo the
22 quotation in the Eastern District of California
23 case saying there is no certainty that defendant's
24 motion would prevail. I understand. And
25 therefore -- and yet the discovery will be futile.

1 I understand thank you. I missed that.

2 MR. SNYDER: They tell your Honor the law
3 is -- which is extraordinary since your Honor wrote
4 one of the leading decisions in this circuit on
5 this point.

6 THE COURT: Really? Did I?

7 MR. SNYDER: I mean, people cite it.

8 THE COURT: I had no idea it was leading.

9 MR. SNYDER: It's cited.

10 THE CLERK: Thank you.

11 MR. SNYDER: What I mean, your Honor, is
12 they tell your Honor --

13 THE COURT: Flattery will get you
14 absolutely no place.

15 MR. SNYDER: I understand, but I can't
16 help it.

17 THE COURT: I know.

18 MR. SNYDER: They tell your Honor that it
19 must be certain that the motions will prevail.
20 That is a false statement of the controlling law.
21 There's no other way to say it. So -- so we've met
22 that standard with respect to the evidence of
23 plaintiff's fraud last summer, when we sought
24 expedited discovery, and since then, because of the
25 overwhelming evidence we've uncovered, obviously

1 our case for dismissal is even stronger, so
2 awarding the plaintiff the plenary discovery now
3 that your Honor determined he was not entitled to
4 in July would make no sense and would reward this
5 plaintiff who comes to the court with the
6 uncleanest of hands and with an unpaid sanction and
7 worse for his disobedience.

8 So the first factor we think is 99-to-1 in our
9 favor. The burden on defendants is obvious. Now,
10 Mr. -- the first moment I was in court in this case
11 in front of Judge Arcara on the frivolous motion to
12 remand, that was where -- that was the first series
13 of lies they told after filing the complaint, which
14 is that somehow Mr. Zuckerberg, they said, was an
15 itinerant traveler who was living out of a
16 backpack, which, of course, was all make believe.
17 But the first -- I can tell your Honor the first
18 time I saw Mr. Argentieri and his counsel, and he
19 said oh, we should talk, we're going to get
20 Mr. Zuckerberg's deposition. Get zuch. He has an
21 email account to that effect. That's been their
22 goal from day one to subject Facebook and my
23 clients to e-discovery. They brought some vendor
24 from the Milberg firm who is presumably going to
25 tell your Honor that how they should scrounge

1 through all of Facebook's computers since 2003.

2 That's what they want.

3 Committing a criminal fraud in this court,
4 spoliating evidence, lying to your Honor
5 repeatedly, they want to conduct discovery of
6 Facebook's computer dating back to 2003, make
7 forensic images of all the computers, search every
8 one of the thousands of computers and documents,
9 and there's absolutely no valid basis for this
10 abuse of discovery, which ironically is broader
11 even than what the lawyer -- I can't remember which
12 one -- said to your Honor they wanted when they
13 were opposing our request for expedited discovery.

14 THE COURT: Mr. Lake.

15 MR. SNYDER: Mr. Lake, right. So the
16 purpose of all this is laid out in their litigation
17 overview document, which was Mr. Argentieri and
18 Mr. Homburg, whoever he is, extortion document
19 which was the one that they used to try to sell a
20 piece of this lawsuit to a law firm. And that
21 document makes clear that the sole purpose from day
22 one was to jack up Facebook, harass Facebook into a
23 settlement, which Mr. Ceglia told the press, quote,
24 "You won't go public, Mark. You won't IPO, you
25 won't past go. I won't let you sell this company

1 out from under me, not while I have the power to
2 stop you." It's difficult to imagine when you put
3 the litigation overview document together with that
4 statement, a more clear expression of the true
5 motive behind this fraudulent lawsuit, which is the
6 second factor, to harass and abuse the defendants
7 through the discovery process using a criminal
8 fraud, as present litigation, as the mechanism to
9 try to extract the settlement that they want, but
10 will never, ever get.

11 Now, the third factor is prejudice. In the
12 good cause -- in the determination of whether a
13 stay is appropriate. These newest lawyers and
14 Mr. Ceglia have not identified any cognizable
15 prejudice that would result from a stay of plenary
16 discovery pending a ruling on defendant's
17 dispositive motions because, of course, we have the
18 motion for judgment on the pleadings as well.

19 So, instead what he says is we're really moving
20 for summary judgment, and on summary judgment
21 cases, we're entitled to all sorts of discovery,
22 and the Court can't find facts. I've addressed all
23 of that. The point here is a simple one. A party
24 perpetuating a fraud does not have the right --

25 THE COURT: You don't think they're

1 entitled to some discovery directed to when the
2 statute of limitations accrued and the possibility
3 of equitable estoppel based on Welling?

4 MR. SNYDER: No. I think that under
5 Rule 12 if your Honor believes that there are facts
6 outside the pleading that are necessary to resolve
7 that motion -- we believe there are none, the
8 proper -- your Honor has two choices. Your Honor
9 can deny the motion and say it's premature. Your
10 Honor can convert the motion to a Rule 56 motion,
11 in which case we would say, if your Honor were
12 inclined to do that, put that motion in abeyance,
13 because the fraud here is the threshold issue and
14 there's no need even to waste time on that, if your
15 Honor --

16 THE COURT: Put statute of limitations and
17 laches aside?

18 MR. SNYDER: We believe it is ripe,
19 because there are facts in the public record, facts
20 of which this Court could take judicial notice that
21 make this case woefully time barred, and make the
22 application of laches as a matter of law clear.
23 But back to the question of the third factor, the
24 prejudice. A party perpetrating a litigation fraud
25 forfeits the right to engage in plenary discovery.

1 That's the whole purpose of the inherent power
2 doctrine to short circuit the fraud before the
3 system, the victim defendant, and the public are
4 abused through the course of litigation, because
5 the goal the fraudulent lawsuits often is to
6 subject defendants to cost, expense, and burden of
7 discovery to provoke a settlement.

8 So, it's our view, your Honor, that this
9 plaintiff has had access to the very original
10 document and electronic copies that we have
11 examined, and our experts have determined,
12 corroborate and constitute ironclad proof of fraud.
13 They've had those materials for years, all of his
14 so-called emails, all of his computers, his floppy
15 disks, his CDs, his hard drives, his web mail
16 accounts. Indeed he had access to materials that
17 no longer exist, because he destroyed them. So he
18 had greater access than we or the Court.

19 THE COURT: When did you say he -- I must
20 have -- I tried to read all of Stroz Friedburg's
21 report. I didn't read line-by-line all of the
22 others. I didn't have time. But just -- is there
23 a reference in there wherein they say that they
24 found that it was deleted. I think that's the Get
25 Zuch account was deleted.

1 MR. SNYDER: The Get Zuch account was --
2 all the content in that email account was deleted
3 on February 28th, 2012.

4 THE COURT: 2012?

5 MR. SNYDER: January 28th, 2012. Stroz
6 Friedberg identified it on February 1, 2012, lo and
7 behold.

8 THE COURT: I'm confused how. Stroz
9 Friedberg received the account, they had access to
10 the account on what date?

11 MR. SNYDER: What happened was --
12 February 1st is when he they found it. They found
13 a remnant of it, or they found some forensic
14 reference to it.

15 THE COURT: He identified it before,
16 didn't he?

17 MR. SNYDER: No. He lied to this Court
18 when he submitted his supplemental affidavit on
19 August 29.

20 THE COURT: But he -- but he then gave us
21 a --

22 MR. SNYDER: Well, when Stroz Friedberg
23 said we found it, once again he said oh, yeah, I
24 forgot about it. Forgot about it? He just -- he
25 just wiped out all the contents.

1 THE COURT: When did that supplemental
2 declaration get filed where he did acknowledge it?

3 MR. SOUTHWELL: Your Honor, it was in --

4 THE COURT: This is Mr. Southwell speaking
5 for the record.

6 MR. SOUTHWELL: Thank you, your Honor. It
7 was after Stroz Friedberg identified references to
8 the Get Zuch account in his other email accounts.
9 That information was disclosed. At that point
10 Mr. Boland offered to make -- to provide the
11 consents, and we provided the consents to gmail.
12 We went back and forth. We had a fifth motion to
13 compel, and we very recently got the information
14 from that account, which is what revealed that back
15 in January that there is no content from earlier
16 than January of 2012, i.e. the deletion.

17 MR. SNYDER: As he submitted a declaration
18 now to (indiscernible) account yet?

19 MR. SOUTHWELL: Now he has put in the
20 supplemental declaration I think that your Honor is
21 referring to --

22 THE COURT: Yes.

23 MR. SOUTHWELL: -- which does, in fact,
24 I'd now after --

25 THE COURT: What was the date of that

1 supplemental declaration, anybody --

2 (Indiscernible cross-talk)

3 THE COURT: One at a time.

4 MR. BOLAND: I'm sorry, your Honor,
5 there's actually two of those. He offered a
6 declaration which just identified the newly
7 discovered accounts which he had not used, so he
8 had forgotten them. And in an abundance of
9 caution --

10 THE COURT: What was the date of that?

11 MR. BOLAND: I'll have to look -- I'll
12 look and find it, your Honor, and then he
13 submitted --

14 THE COURT: I'm trying to understand
15 whether he gave the declaration before or after he
16 emptied out the account.

17 MR. SNYDER: After. After, your Honor,
18 for sure. So when Mr. Boland says to your Honor,
19 again he didn't -- he didn't say that under oath.
20 Maybe he will certify that he's saying it under
21 Rule 11 that he hasn't used it, that's a lie.
22 Because all of the content was deleted by the
23 plaintiff on January 28th, 2012. It's difficult to
24 imagine a more relevant use by a litigant than
25 deleting an email account during the course of this

1 litigation entitled Get Zuch, meaning get my
2 client. Presumably damage, harm, victimize my
3 client, which is what he is doing here.

4 THE COURT: So, that's why I'm focusing on
5 it. So you're saying that if the declaration
6 post-dates the deletion, the declaration is false?

7 MR. SNYDER: The declaration --

8 THE COURT: Do I have it correctly?

9 MR. SNYDER: The declaration is not
10 only --

11 THE COURT: No. No. I'm really concerned
12 about this sequence, since you raise it. And seems
13 to me to be a very simple question. Why can't I
14 get a straightforward answer?

15 MR. SNYDER: The declaration, your Honor,
16 was dated by -- dated February 22, 2012.

17 THE COURT: You're going too fast. Slow
18 down.

19 MR. SNYDER: So let me give the whole
20 chronology carefully and slowly.

21 THE COURT: Please.

22 MR. SNYDER: In April of 2011 --

23 THE COURT: Yes.

24 MR. SNYDER: -- unbeknownst to us during
25 the course of this litigation, the plaintiff

1 created an account entitled getzuch@gmail.com. As
2 a result of various acts of misconduct your Honor
3 granted our motion and required Mr. Ceglia to
4 supplement his prior sworn declaration.

5 On August 29, 2011, he submitted a new
6 declaration purportedly curing the previous
7 declaration, which was false and incomplete. He
8 did not disclose in his August 2011 declaration the
9 existence of the account he had created several
10 months earlier.

11 THE COURT: Get Zuch.

12 MR. SNYDER: Yes.

13 THE COURT: I got that.

14 MR. SNYDER: On February 1st, 2012, Stroz
15 Friedberg, during its forensic examination,
16 identified four new web mail accounts --

17 THE COURT: Excuse me, February --

18 MR. SNYDER: 1st, 2012, Stroz Friedberg
19 identified four new web mails accounts --

20 THE COURT: Yes.

21 MR. SNYDER: -- about which we were
22 unaware because Mr. Ceglia in his various sworn
23 statements failed to disclose them. We then sought
24 a motion to compel to get access to those accounts.
25 And after wrangling --

1 THE COURT: And get a complete declaration
2 including them.

3 MR. SNYDER: And after wrangling, all
4 sorts of false starts, and snide, snarky emails,
5 which I can show your Honor at some point --

6 THE COURT: I read them all. I granted
7 your motion.

8 MR. SNYDER: We finally -- I got access to
9 the account --

10 THE COURT: Yes.

11 MR. SNYDER: -- after much expense and
12 burden --

13 THE COURT: Yes.

14 MR. SNYDER: -- and found that on
15 January 28th, 2012, contrary to Mr. Boland's
16 representation to your Honor moments ago, this
17 plaintiff deleted all of the content of that
18 email -- of that email account. It's gone.
19 Forever. He spoliated --

20 THE COURT: When did he supplement --

21 MR. SNYDER: And then finally --

22 THE COURT: Yes.

23 MR. SNYDER: -- on February 29 -- 22, 21
24 days after Stroz Friedberg first identified it, but
25 after we disclosed to Mr. Boland our findings, and

1 almost a month after Mr. Ceglia knew that he had
2 sanitized, deleted the account, he submitted a
3 sworn declaration to your Honor swearing pursuant
4 to the penalty of perjury that he was -- "I was
5 recently made aware of additional email accounts
6 accessed from our computer analyzed by defendants'
7 electronic discovery firm. At the time of
8 completing any prior declaration, I did not recall
9 the existence of any of these email accounts,
10 otherwise they would have been disclosed in these
11 declarations per the Court's orders. These email
12 accounts were not concealed by anyone by their
13 omission from prior declarations". And he goes on,
14 "immediately being informed of the existence, I
15 completed consent forms and give them to my
16 lawyer." And then with respect to the Get Zuch, he
17 does not address it -- oh, he does say "It's my
18 understanding that signed consent forms for the
19 accounts, which include the Get Zuch account, were
20 provided to defendants' counsel immediately after
21 receipt by my lawyer." Then he says, cherry on the
22 top, "I do not have any recollection at this time
23 of any additional email accounts I may have created
24 and/or used, other than those already disclosed to
25 defendants."

1 Now this was an another perjurious submission
2 because he is telling your Honor falsely that he
3 didn't recall the existence, and they weren't
4 concealed from anyone, when, in fact, he created
5 the account in April of 2011 and failed to disclose
6 them to your Honor in August of 2011. And if it
7 happened to have slipped his mind that he created a
8 Get Zuch account, he should have remembered it in
9 February 2012, because on January 28th, 2012, he
10 took the active unlawful step of deleting its
11 contents.

12 So we now have all of that content missing, as
13 well as the USB device with page 1 and page 2.tiff
14 of the very contract on which he's suing which he
15 also withheld and concealed from the court. We
16 respectfully submit that those two acts of defiance
17 alone constitute grounds for summary dismissal of
18 the case immediately without any further review of
19 any evidence. And without making any predictions,
20 the notion that the Second Circuit United States
21 Court of Appeals wouldn't summarily affirm that and
22 refer it for consideration by all sorts of
23 different tribunals is -- is -- is -- let me just
24 say that it's difficult to imagine more defiant act
25 of relevant, prejudicial case-ending spoliation

1 than those two. He's suing on a contract, page 1
2 and page 2 of which were on a tiff file that we
3 found -- we found the original authentic contract
4 on a tiff file that he concealed. It's on a USB
5 device that he spoliates. That was his first
6 efforts to hide the authentic StreetFax contract.

7 He didn't think we would find his Seagate hard
8 drive, so he spoliates the USB device with tiff
9 page 1, page 2. He hides the Seagate, so then when
10 we found the Seagate, he had a problem. So because
11 the act of spoliation now has relevance and
12 conduct. We understand why he destroyed the USB
13 device.

14 And then the Get Zuch, of course, we'll never
15 know what he used that account for you because that
16 electronic data is lost, lost forever. So --

17 THE COURT: No way that it can be
18 reconstructed?

19 MR. SNYDER: Our request, your Honor, is
20 that the Court stay discovery, defer setting a
21 discovery schedule until this Court has ruled on
22 defendants' dispositive motions, and I'm happy to
23 answer any other questions and certainly respond to
24 anything --

25 THE COURT: You're willing to allow them

1 to conduct some limited discovery of their experts
2 -- or your experts?

3 MR. SNYDER: It's our position, your
4 Honor, that no discovery is necessary or
5 appropriate. What we said in our reply brief is
6 that if your Honor is inclined to permit some
7 discovery, and I know your Honor made comments to
8 that affect that your Honor was thinking that might
9 be something to consider at a prior hearing, it
10 should be limited solely and narrowly tailored
11 consistent with the case law to the relevant
12 forensic issues raised in -- in defendants' motion
13 dismiss, which would be some discovery directed our
14 experts, and if they have their own experts --

15 THE COURT: Do you agree? I don't think
16 you do, but I just want to make sure I have it
17 straight, do you agree that there conceivably could
18 be any reason for a deposition of any of your
19 experts on any grounds?

20 MR. SNYDER: I could see that there would
21 be -- I don't think it's at all necessary, meaning
22 to say I think this Court is within its sound
23 discretion to dismiss this case on the record
24 before it on multiple, multiple grounds without any
25 additional development of the record. I think that

1 plaintiff has been afforded every process and
2 privilege that is due given the facts and
3 circumstances of the fraud, and, frankly, his
4 egregious litigation conduct here, which I think is
5 relevant to where this Court is going to open up
6 this Court's processes any further to this
7 plaintiff. So it's our position that your Honor
8 can and should dismiss the case on the record
9 before it.

10 We made the -- we made the alternative argument
11 just to let your Honor know that in the event that
12 the Court was thinking about some kind of
13 discovery, the most we think that would be at all
14 even arguably appropriate would be limited to
15 depositions of our experts, and if they have any
16 experts who are willing to swear to anything, that
17 we would depose them. But anything beyond that
18 would be -- would be inappropriate and --

19 THE COURT: I'm thinking about the cost of
20 unnecessary delay and although I did allude to a
21 possible fairness consideration back in December in
22 regard to expert discovery or expert opinions I
23 should say, I just -- concerned about the amount of
24 time that that would be required to be completed,
25 and then, of course, assumedly -- which we'll find

1 out momentarily from one or more of plaintiff's
2 attorneys -- to what extent -- whether the --
3 regardless of the breadth of discovery that may be
4 permitted, if any, in the event that there is some
5 thought about taking expert depositions, exactly
6 what would be the justification for it under these
7 circumstances?

8 MR. SNYDER: I mean, I think, your Honor,
9 that that --

10 THE COURT: I mean, I -- at the time we
11 were discussing it, I had no idea of what exactly
12 your experts were going to say and how they were
13 going to say it, but I do now.

14 MR. SNYDER: We think that the request for
15 any discovery of our experts is for the same
16 purpose as their -- their request for any
17 discovery, which is to delay and impose more
18 burden. I think that, for example, if your Honor
19 was reviewing the evidence and at any time had any
20 questions about any of the evidence as -- as the
21 fact finder and gatekeeper that your Honor -- in
22 that role, it would be certainly appropriate if
23 your Honor had any questions while reviewing the
24 record, which is extensive, there are ways in which
25 your Honor communicates very effectively with

1 counsel. You did with respect to 1008 and all
2 sorts of other issues. And if during the course of
3 your Honor's review of the extensive record, your
4 Honor had any questions, there are ways that the
5 parties can address them more efficiently and
6 targeted, than, you know, 28 days of depositions
7 where there will be 14 other motions to compel and
8 false emergencies, and the like, and the discovery
9 of the StreetFax contract ends this case. The
10 spoliation ends this case, and, your Honor, doesn't
11 even need to --

12 THE COURT: The analysis of the --

13 MR. SNYDER: Work for Hire document.

14 THE COURT: Well, I was thinking of the
15 floppy disks and the alleged copying of the emails
16 between Mr. Ceglia and Mr. Zuckerberg --

17 MR. SNYDER: Yes.

18 THE COURT: -- which seeming to implicate,
19 according to your experts, computer system clock
20 manipulations and back dating, which is really
21 quite interesting.

22 MR. SNYDER: And I will say that we are
23 aware that one or more of the law firms involved in
24 this case before filing pleadings before this Court
25 had access to all of those electronic media and

1 conducted their own examination and never informed
2 this Court, because they knew or should have known,
3 that those computers were -- were riddled and
4 polluted with the most abusive evidence of
5 manipulation, and no one on this table is going to
6 challenge Stroz Friedberg.

7 Indeed, your Honor made reference to the
8 Milberg firm. I have no awareness of this. I
9 would imagine the Milberg firm has hired Stroz
10 Friedberg, and I imagine if this gentleman here was
11 put under oath, he would tell you that the Stroz
12 Friedberg firm is the best in class. There is no
13 close number two to them. The United States
14 government hires them when they need help. And
15 they have sworn to your Honor to all of this
16 evidence, and I would like to -- I challenges any
17 of these lawyers to tell your Honor why any of that
18 is wrong.

19 Mr. Dumain tells the Wall Street Journal that
20 there was a plant and a hack. Does he have a --
21 does he have any forensic evidence to support that?
22 What do his experts say to justify discovery?

23 THE COURT: He said that to the Wall
24 Street Journal?

25 MR. SNYDER: He did.

1 THE COURT: I didn't see that. Well then
2 I don't keep -- I don't read the Wall Street
3 Journal.

4 MR. DUMAIN: I'm sorry, your Honor, I did
5 not say that to the Wall Street Journal.

6 THE COURT: Oh, okay. Thank you. One
7 last question. I know we're not here for oral
8 argument on the motion to dismiss, and, of course,
9 you'll want to perhaps have some rebuttal, and this
10 is all very important, so I'm completely at your
11 disposal as far as the amount of time you wish to
12 take in presenting your positions, but I was
13 intrigued by this discussion in -- let me see,
14 Miss Aycock's declaration -- I want to give her
15 some credit here -- and the Stroz Friedberg report
16 pages 41 to 43. It wasn't clear to me when the
17 plaintiff used the hex editor, and I wasn't quite
18 clear on what the -- I know we're not here for oral
19 argument on the merits of the motion, but --

20 MR. SNYDER: We would be happy to answer
21 any questions.

22 THE COURT: Excuse me. It's not clear --
23 I mean, it does sort of bear on the question of the
24 stay, which then forces the Court to look to some
25 degree at the merits and probability of success on

1 the motion to dismiss.

2 MR. SNYDER: Of course.

3 THE COURT: And the notion of a hex editor
4 was totally new to me and novel, and it had sort of
5 an oh, what shall we say, a mysterious -- I'll use
6 that term diplomatically -- ring to it or aura, and
7 yet I couldn't quite figure out why it was in your
8 papers. And I realize there's some degree of
9 speculation involved, but I just thought I'd -- I
10 would just express candidly a lack of clarity or
11 understanding as to what your point was about it.
12 Particularly when was it that -- when was it that
13 Stroz Friedberg thought that he might have used it.
14 And were you attempting to imply perhaps that he
15 did use it somehow to create the Work for Hire
16 contract or some other documents? I really
17 couldn't -- I'm trying to understand what the
18 relevance of it is.

19 MR. SOUTHWELL: Your Honor, I would be
20 very happy to address --

21 THE COURT: Or maybe a supplemental
22 briefing, but to the extent that it was intriguing
23 to me and had a certain, like I say, an aura of
24 mystery about it -- I suppose to be very candid, it
25 had more than an aura of mystery. It had an aroma

1 of suspiciousness about it.

2 MR. SOUTHWELL: Agreed, your Honor. It's
3 a very interesting issue. The Aycock declaration
4 is actually filed publicly --

5 THE COURT: I mean, as I understand it,
6 this hex editor allows a person to manipulate data
7 in a way that's indiscernible to normal forensic
8 analysis.

9 MR. SOUTHWELL: Indeed, your Honor.

10 THE COURT: What conceivable use could
11 this plaintiff have made of it in the context of
12 this case.

13 MR. SOUTHWELL: A very good question, your
14 Honor.

15 THE COURT: Well, thank you for that.

16 MR. SOUTHWELL: I can't actually respond,
17 your Honor. Those documents have been designated
18 as confidential by the plaintiff --

19 THE COURT: Really?

20 MR. SOUTHWELL: -- which is why we did not
21 disclose --

22 THE COURT: They're in the Aycock
23 declaration.

24 MR. SOUTHWELL: -- in the public record --
25 THE COURT: Oh, okay.

1 MR. SOUTHWELL: -- the substance of the
2 Aycock declaration.

3 THE COURT: Well, you're not disclosing
4 the documents to give me your opinion as to why you
5 allude to them to the Court. I don't think, do
6 you?

7 MR. SOUTHWELL: I think it is certainly a
8 very suspicious --

9 THE COURT: Do you have any objection to
10 that, Mr. Boland.

11 MR. BOLAND: No, your Honor, none at all.
12 I'd like to hear what he has to say.

13 THE COURT: You'd be intrigued to know
14 too, wouldn't you?

15 MR. BOLAND: I'd be intrigued to know.

16 THE COURT: And you don't need it to be
17 redacted?

18 MR. BOLAND: No. Whatever he has to say,
19 your Honor, we'll have a response. I'm interested
20 to hear.

21 THE COURT: Thank you.

22 MR. SOUTHWELL: Your Honor, hex editor
23 programs are known for manipulating the underlying
24 code of a document. And there are other documents
25 in the record and attached to the Aycock

1 declaration which illustrate the use of a hex
2 editor to apparently manipulate the metadata, the
3 data underlying the document that shows its
4 providence, which is all suggestive of an attempt
5 to create a fraudulent document. And we would
6 submit, your Honor, that this is directly related
7 to the supposed Work for Hire document which has
8 been advanced in this case, and that the -- what he
9 refers to test forgeries.

10 THE COURT: He wouldn't need to use a hex
11 editor to finesse that, would he?

12 MR. SOUTHWELL: For the electronic version
13 of it.

14 THE COURT: There's no indication from
15 Stroz Friedberg that he did.

16 MR. SOUTHWELL: Actually, yes, your Honor,
17 for the electronic version.

18 THE COURT: That's what I'm not grasping
19 here.

20 MR. SOUTHWELL: So there's -- they have
21 advanced a hard copy version, you know, a purported
22 original. There was one attached to the complaint.
23 There was the one presented for inspection in
24 response to the Court's order which we have put in
25 evidence is, in fact, different than the one that

1 was attached to the complaint. But we also
2 expected to find an electronic version of it
3 because, of course, Mr. Ceglia has said under oath
4 that he created it on a word processing program and
5 then printed it. One would expect to find an
6 electronic version.

7 THE COURT: But there was none.

8 MR. SOUTHWELL: None was found, but what
9 was found were numerous test forgeries, documents
10 which were indicative of attempts to create that
11 electronic version of the document, and then
12 deleted versions that appeared to be related to
13 those documents. And there was evidence of a hex
14 editor being used in relation to that, a program
15 that can be used to alter or manipulate underlying
16 data, much like the backdating, your Honor, that
17 you focused on. When you backdate system clock,
18 you are changing or trying to change the metadata
19 behind the documents. Those are all the forensic
20 artifacts that one looks for to try to ascertain
21 the authenticity of documents.

22 THE COURT: You're saying that he -- well,
23 if he's manipulating code -- he doesn't need to
24 manipulate code. He had a -- which I just, because
25 we're working on the -- as you know, we reserved

1 decision on the motion to compel the ten documents
2 asserted to be work -- attorney-client privileged
3 and work product. We're working on that issue.

4 MR. SNYDER: Yes, your Honor.

5 THE COURT: And something came up there,
6 and I looked at it and I said geez, I thought he
7 didn't have -- he claimed he didn't have the
8 StreetFax contract. Well, as it turned out what I
9 mistakenly understood to be the StreetFax contract
10 was actually the StreetFax -- what the heck was it
11 called, specimen or --

12 MR. SOUTHWELL: Specification?

13 THE COURT: No. Some other word. I'm
14 stumbling now. Format or template where he used
15 that document to engage in negotiations to get the
16 StreetFax project up and running. And without
17 breaking the confidentiality, there is a document
18 in Miss Aycock's declaration wherein the StreetFax
19 format, if that's what it's called or something
20 else, was used, and there's a signature by somebody
21 that apparently engaged in some commercial
22 relationship with the plaintiff relative to the
23 project.

24 MR. SOUTHWELL: Right.

25 THE COURT: So my point is that if he was

1 able to create that text, which you've agreed as to
2 the second page is identical to the Work for Hire
3 document, then you can see what -- as a
4 nontechnical person who's struggling to understand
5 all of this high-tech terminology is trying to
6 grasp, then why would it be necessary to use a hex
7 editor to create the entirety of the Work for Hire
8 document?

9 MR. SOUTHWELL: I think, your Honor,
10 because --

11 THE COURT: Is that a fair question?

12 MR. SOUTHWELL: Yes. And let me try to
13 respond this way, your Honor. One would expect to
14 find a electronic version of this Work for Hire
15 document.

16 THE COURT: You know what I'm talking
17 about. I'm now referring to the Work for Hire --
18 or, excuse me, the StreetFax template or whatever
19 this word is that I can't remember. It's revealed
20 in the documents that you --

21 MR. SOUTHWELL: Right.

22 THE COURT: -- that you submitted to me.

23 MR. SOUTHWELL: There's the authentic
24 StreetFax contract, and there are other related
25 contracts to that authentic StreetFax contract, all

1 of which corroborate the authentic StreetFax
2 contract.

3 THE COURT: No, no, no. This is a
4 document -- this is like the original. It's almost
5 as if what I'm trying to describe to you and if
6 there's a word in the document you have it in front
7 of you, you can see it. It's like template or
8 specification, or something, wherein he created
9 this document with all his legal verbiage -- sort
10 of a kitchen table contract by a nonlawyer, always
11 a dangerous thing obviously, as this case shows
12 dramatically -- and it was that. That was in his
13 possession, and it was in his system. So why would
14 he need a hex editor to create another page of it?

15 MR. SOUTHWELL: Your Honor, because, I
16 would submit, he was trying to create an electronic
17 version of his fabricated contract to further his
18 fraud to show --

19 THE COURT: Why would he need to use a hex
20 editor to do that? That's what I'm not getting.

21 MR. SOUTHWELL: Because it's supposed to
22 be from 2003, and he's creating it in 2011. It's
23 supposed to be from 2003 if it's for real, but it's
24 really from 2011 when he's creating it. So he
25 needs to use the hex editor, much like he's

1 backdating --

2 THE COURT: But he knows -- according to
3 you, he knows how to backdate a computer, the
4 metadata. What does the hex editor get him?

5 MR. SOUTHWELL: There's more to backdating
6 then simply backdating the system clock. You use
7 the hex editor to wash over or cover up some of the
8 tracks of creating the document recently. So there
9 are examples that are detailed there of multiple
10 documents that appear to be test forgeries, ten
11 different copies of this Work for Hire sort of
12 template. And there are six documents that appear
13 to be used to test the effects of modifying a Word
14 document with a hex editor. And there are files
15 that you are called text to copy over to test
16 document, document to paste into. And those were
17 all saved in folders called work to copy into
18 beginning folder.

19 THE COURT: Okay. Okay.

20 MR. SOUTHWELL: And all of that was used
21 for the sole purpose of testing the use of a hex
22 editor, and as in Stroz Friedberg's experience,
23 that is how electronic forgers forge their
24 documents. They need to test it out. It's not
25 something they can just do.

1 THE COURT: Its only use is for illegal
2 purposes?

3 MR. SOUTHWELL: No, your Honor. There are
4 other purposes, but in this context given what was
5 found by Stroz Friedberg on Mr. Ceglia's machine.

6 THE COURT: When did he use it though?

7 That's the other thing that was not clear to me in
8 the -- in the Stroz Friedberg report. Or maybe I
9 missed it.

10 MR. SOUTHWELL: That is a good question,
11 your Honor.

12 MR. BOLAND: They didn't even find the
13 program, your Honor. It's not even on the
14 computer. So they have no idea when it was used.
15 The program itself doesn't exist or anything like
16 it on the computer according to their report.

17 MR. SOUTHWELL: Right. But what does
18 exist is documents which include phrases like "this
19 is a Word document that has been newly created. I
20 will test how the coding comes into the hex
21 editor."

22 THE COURT: What I'm trying to drive at is
23 it just sort of amateur's effort to self-aggrandize
24 him or herself because they now have this text
25 editor thing that they can play with and manipulate

1 and feel like they're engaging in some sort of
2 high-tech, you know, manipulation, and wow, isn't
3 this neat. I'm able to you fool around with it
4 with a hex editor. But does it necessarily follow
5 that it was used in connection with committing the
6 fraud that's alleged here against the defendant?

7 MR. SOUTHWELL: I think it certainly does,
8 your Honor. It certainly does.

9 MR. SNYDER: Your Honor, let me just --

10 THE COURT: I don't want to dwell on it
11 this. It's just that --

12 MR. SNYDER: Your Honor, what it shows --

13 THE COURT: I have dwelled on it.

14 MR. SNYDER: What it demonstrates I think
15 by clear and convincing evidence if not beyond a
16 reasonable doubt that Mr. Ceglia created the Work
17 for Hire document by merging a new fake page 1 with
18 an already existing document, page 2 of the
19 authentic StreetFax contract, and then used a hex
20 editor and other forensic manipulations to try to
21 create fingerprints on page 1 of the document that,
22 when forensic experts looked at it, it will look
23 like it was created in 2003. And so this program
24 in this context is used to edit raw data that make
25 up the file, rather than the text of the file, and

1 indeed that was his attempt to create an electronic
2 version of the document that contains a 2003, what
3 I would say is metadata.

4 Now, if there's any doubt about that --

5 THE COURT: But you don't need hex editor
6 capability to manipulate metadata.

7 MR. SNYDER: No, but that is -- it's a
8 tool in the same way -- there are lots of ways to
9 commit a murder. There's lots of ways to commit
10 document forgery.

11 THE COURT: That's my point. I had the
12 impression from Stroz Friedberg that his
13 manipulation of metadata was based on other --

14 MR. SNYDER: It was manifold.

15 THE COURT: Other high-tech interventions
16 by the plaintiff, not from the hex editor.

17 MR. SNYDER: Yes. It is manifold, meaning
18 the test forgeries and the other forensic data
19 revealed multiple attempts, some successful, some
20 not, to manipulate metadata. There was backdating
21 for sure, but there also was the use of the hex
22 editor, and then, of course, there was what I would
23 say is undeniable proof of -- of document --

24 THE COURT: Stroz Friedberg actually say
25 that the hex editor technique was used to create

1 the fake Work for Hire contract.

2 MR. SOUTHWELL: Yes. If you refer to
3 page 42 of the Stroz Friedberg report, they refer
4 to this document that was discovered on
5 Mr. Ceglia's computer called --

6 THE COURT: Just a second. Wait a minute.
7 Forty-two?

8 MR. SOUTHWELL: 42.

9 THE COURT: You have that, right,
10 Mr. Boland?

11 MR. BOLAND: Yes, your Honor, if they're
12 talking about the report that was provided by Stroz
13 Friedberg.

14 THE COURT: You have it right there -- you
15 probably have it right there on the screen because
16 you're so high tech, right? You're totally
17 automated. Completely automated lawyer. Okay.
18 I've got page 42. Go ahead, Mr. Southwell.

19 MR. SOUTHWELL: Yes, your Honor. It
20 refers to the SFwebWorkforHireMZ.com file.

21 THE COURT: Yes, I've read that.

22 MR. SOUTHWELL: Which was one of --
23 earlier in the Stroz Friedberg report they talk
24 about the seven backdated versions of the Work for
25 Hire document, unsigned versions.

1 THE COURT: Yes.

2 MR. SOUTHWELL: This is one of them. And
3 as Stroz Friedberg reports, shows evidence of the
4 use of a hex editor or similar tool --

5 THE COURT: Yes.

6 MR. SOUTHWELL: -- and they then explain
7 how they see that. And the reason they see that
8 and come to that conclusion is that when viewing
9 the metadata of the file using a common program
10 called Metadata Assistance, it appears there's no
11 information.

12 And then if they -- if you turn the page to 43,
13 all right, so using a normal tool, it's blank if
14 you will. There's no information of metadata.
15 When they have then used a more sophisticated
16 forensic tool, which they describe on page 43,
17 there is, in fact, metadata found, and it indicates
18 that the document originated in a certain folder.
19 The folder is C:\documents and settings:iasia,
20 I-A-S-I-A \My Documents\StreetFax\contracts\work
21 for hires. And it was authored by the user Brendan
22 Ceglia.

23 THE COURT: Who is Brendan Ceglia?

24 MR. SOUTHWELL: We understand that is the
25 plaintiff's brother.

1 THE COURT: So the plaintiff's brother was
2 involved in manufacturing the fake Work for Hire
3 contract using hex editor, is that what this says
4 in layman's language?

5 MR. SOUTHWELL: That a computer and user
6 registered to him, whether it was him or it was, in
7 fact, you know, Mr. Paul Ceglia --

8 MR. SNYDER: If you recall, your Honor,
9 this is not first time we've encountered Brendan
10 Ceglia in this case. It was his daughter who was
11 the recipient supposedly of confidential emails
12 that they tried to --

13 THE COURT: I don't remember the name of
14 the father, which is -- I may have missed that.

15 MR. SNYDER: It was Jessica Ceglia --

16 THE COURT: I remember her. Yes, I
17 remember her being mentioned. I didn't recall
18 Brendan, however. So that's what I'm -- that's the
19 answer to my question --

20 MR. SOUTHWELL: Yes, your Honor.

21 THE COURT: If I read this with or without
22 Mr. Healy's assistance, which I'll probably have to
23 ask for, I'll eventually get it straight that
24 this -- this text and this -- this -- and these two
25 pages of the Stroz Friedberg report assert that

1 the -- that a person by the name of Brendan Ceglia
2 had something to do with the creation of the fake
3 first page of the Work for Hire document using the
4 hex editor capability.

5 MR. SOUTHWELL: Yes, and specifically,
6 your Honor, the conclusions Stroz Friedberg makes
7 is that there are changes that have been made to
8 the file in such a way that do not preserves its
9 structure, including metadata, which is indicative
10 of the use of a hex editor or similar tool to
11 manipulate the file.

12 THE COURT: So it is relevant?

13 MR. SOUTHWELL: Yes, your Honor.

14 THE COURT: Thank you. Okay. I'm glad I
15 asked.

16 MR. SNYDER: Your Honor, there's one more
17 issue I just want to address, because it is
18 addressed in the opposition brief, which is
19 statements made by plaintiff's counsel concerning
20 what we call the spoliation of the original
21 contract when Mr. -- the yellowing of the document.
22 And this is another example of counsel making
23 irresponsible statements to this Court without a
24 good-faith basis in fact. So, the objective
25 evidence, meaning photographs and videos taken

1 minutes after Mr. Argentieri removed the
2 documents --

3 THE COURT: We're now talking about the
4 baking problem?

5 MR. SNYDER: Yes -- from the envelope are
6 crystal career on this point. There's no discovery
7 needed, your Honor, using common sense and good
8 judgment as a fact finder can look at those
9 photographs, can look at those videos, and can see
10 that the document that Mr. Argentieri took out of
11 the envelope after having it in his possession,
12 custody, and control throughout this litigation in
13 a safe deposit box --

14 THE COURT: Well, unless --

15 MR. SNYDER: -- is yellowed.

16 THE COURT: Yeah.

17 MR. SNYDER: And there is no claim that
18 we, the defendants, had any access to that document
19 between January when his experts copied one version
20 of it and it was white and July when Mr. Argentieri
21 removed it, put it on the table before we touched
22 it, and it was photographed. Your Honor, can look
23 at those photographs, look at the time stamp, and
24 again, unless the martians landed and somehow
25 changed the time and date stamp on the camera,

1 maybe there's an allegation that Mr. Zuckerberg or
2 someone hacked into the camera of the expert, or --
3 so -- so what happens is every time we have
4 evidence of fraud, they make up stuff. They don't
5 swear to it. They don't certify pursuant to
6 Rule 11. Mr. Ceglia says nothing, it's always
7 counsel. And then sometimes the counsel leave the
8 lawsuit, and we can't even ask them where they --

9 THE COURT: Mr. Snyder, eye contact helps
10 so I can butt in here a little bit. Thank you.
11 Now that you brought this up, I recall at an
12 earlier argument there was some reference to you
13 knowing who had access to, and who actually opened
14 the safe deposit box.

15 MR. SNYDER: Yes.

16 THE COURT: And I had the impression you
17 were going to make something of that in connection
18 with the baking problem.

19 MR. SNYDER: We will make something of
20 that in further proceedings. We think that's
21 relevant, not to the motion to dismiss, whether
22 Mr. Argentieri had or did not have access to it.
23 But we can -- there is no dispute that between
24 January when plaintiff's experts copied the one
25 version of the original contract, and that's a

1 white and not the discolored copy, and in July when
2 Mr. Argentieri produced it, there's no suggestion
3 that we had access to that document.

4 THE COURT: No, no, I thought you were
5 going to bolster your argument by giving the Court
6 a certified copy of some sort of an affidavit from
7 a bank executive who would provide the
8 authentication for the records of person signing in
9 and out for the safe deposit box during that
10 relevant time frame.

11 MR. SNYDER: To be honest, we could have.
12 The reason we didn't is because we think the
13 dispositive relevant fact, which is undisputed, is
14 that the document was within the plaintiff's and
15 his agent's custody and control from January until
16 the minute Mr. Argentieri removed it in its
17 spoliated, discolored fashion. And I will note
18 Mr. Argentieri isn't here to address it. But I
19 will note that Mr. Argentieri knew or should have
20 known, but failed to disclose to this Court that
21 the document that he removed from the envelope was
22 a completely different color and in a completely
23 different condition than the document that his
24 experts copied in January, much less a different
25 copy than the one attached to his complaint.

1 That's a separate issue.

2 But certainly when Mr. -- when Mr. Flynn,
3 Mr. Benjamin, Mr. Southwell, and Miss Aycock and
4 all their experts looked at that document, there
5 was a gasp in the room because it looked so
6 different. Mr. Argentieri knew it looked
7 different, never told this Court that.

8 THE COURT: My point is that when it was
9 tendered to -- which expert was it for the
10 plaintiff who looked at it, Ajenski?

11 MR. SNYDER: Yes, your Honor.

12 MR. SOUTHWELL: Ajenski and Mr. Osborne.

13 THE COURT: Osborne and Ajenski. Was it
14 tendered to them physically by the plaintiff
15 himself in person?

16 MR. SNYDER: They swore to this Court that
17 they took a -- yes, a -- a --

18 THE COURT: Who hand it had to them?

19 MR. SOUTHWELL: Mr. Argentieri.

20 MR. SNYDER: Mr. Argentieri.

21 THE COURT: Mr. Argentieri.

22 MR. SNYDER: Yes, he did. He handed them
23 a white document that was not miscolored, but
24 handed us a yellow one that was miscolored.

25 THE COURT: And the question I have is if

1 it's just all Ceglia's signatures -- who was on the
2 safe deposit box?

3 MR. SOUTHWELL: Your Honor, we do have
4 records that Mr. Lake has provided. They show
5 Mr. Argentieri and Mr. Ceglia signing the documents
6 out. We'd be happy to provide those, your Honor,
7 but there's no dispute --

8 THE COURT: But the intriguing question is
9 how many times did it get signed out and by whom?

10 MR. SNYDER: Right. The records are
11 not --

12 THE COURT: And for what period of time?

13 MR. SOUTHWELL: The records show access to
14 the box. They don't, in fact, show whether it was
15 signed out or brought back. But the point --

16 THE COURT: How does that work?

17 MR. SNYDER: In fact, your Honor, we
18 thought of pursuing this. In other words we
19 thought of pursuing evidence from the safe -- from
20 the bank, maybe witnesses to prove that up. But
21 frankly, your Honor, there comes a point in time
22 when enough is enough. Do I think that if that
23 issue was tested that we would be able to --

24 THE COURT: I'll bet you now that I asked
25 about it, you're rethinking your position.

1 MR. SNYDER: Maybe Mr. Flynn will --

2 THE COURT: All I'm asking is very simple
3 questions. Isn't it so that when the bank allows
4 somebody to go into a safe deposit box, they don't
5 allow you to walk out with it unless there's some
6 sort of receipting process so the bank doesn't get
7 accused of negligence?

8 MR. SOUTHWELL: I don't know the
9 procedures of this bank.

10 THE COURT: Well, I mean, if it came out
11 of the box, how could it be exposed to ultraviolet
12 light with clothes pins if it didn't leave the
13 premises?

14 MR. SNYDER: It did leave the premises.

15 THE COURT: That's exactly my point.

16 MR. SNYDER: It left the premises. We
17 don't know exactly for how long.

18 THE COURT: But that's -- how can -- I
19 mean, the bank, do they let people open safe
20 deposit boxes and walk out with the contents only
21 to be (indiscernible) at a later time? I don't
22 think so.

23 MR. SNYDER: We -- the point is, there's
24 no question that Mr. Argentieri, Mr. Ceglia took
25 physically an original document out of the safety

1 deposit box and took it somewhere.

2 THE COURT: How do you know that?

3 MR. SNYDER: The records show that.

4 THE COURT: That's what I'm asking, what
5 does the record show?

6 MR. SOUTHWELL: Your Honor, to be clear
7 there's no dispute that it was in plaintiff's
8 custody prior to when it was produced to us in
9 July.

10 THE COURT: Well, from a legal point of
11 view. I'm trying to understand about the physical
12 point of view.

13 MR. SOUTHWELL: The experts, Mr. Ajenski
14 and Osborne have stated that they received the
15 document in Chicago, that Mr. Argentieri brought it
16 to them in Chicago essentially. Mr. Argentieri has
17 told us that he took it out of the safe deposit box
18 and brought it to the experts in Chicago. The
19 safety deposit box records show accesses to the
20 box. They do not, in fact, show what was taken out
21 or what was put in. They show accesses. The only
22 accesses -- and there are dates -- are by
23 Mr. Ceglia or Mr. Argentieri. We'd be happy to
24 provide that to your Honor. Because there's no
25 dispute that the document was in the custody and

1 control of the plaintiff prior to --

2 THE COURT: Or his agent.

3 MR. SOUTHWELL: Or his agents prior to
4 ever being presented to our experts, it was just
5 not a germane fact to that point.

6 THE COURT: Thank you. Anything else,

7 Mr. --

8 MR. SNYDER: No, your Honor. Thank you
9 for the time. I appreciate it.

10 THE COURT: Do we need a break,

11 Mr. Boland?

12 MR. BOLAND: Yes, your Honor. Thank you.

13 THE COURT: A break?

14 MR. BOLAND: A brief break would be fine.

15 THE COURT: How much time would you like?

16 MR. BOLAND: Ten minutes, your Honor.

17 THE COURT: Ten minutes. Okay, we'll
18 resume in ten minutes.

19 MR. SNYDER: I would just like -- I'm
20 sorry, your Honor. I would just like --

21 THE COURT: Just a second please. Still
22 on the record.

23 MR. SNYDER: I just want it on the record,
24 Miss Aycock has written for me a quote that
25 Mr. Dumain did make to the Wall Street Journal.

1 THE COURT: Who, Mr. Dumain?

2 MR. SNYDER: Dumain I think.

3 THE COURT: Dumain. Is it pronounced
4 Dumain, sir?

5 MR. DUMAIN: Yes, your Honor.

6 MR. SNYDER: Quote, "It didn't take
7 sophisticated hacking to send something from that
8 account", period, close quote. Wall Street Journal
9 quote attributed to Mr. Dumain on Mr. March 27th,
10 2012. I think Mr. Dumain just told, your Honor, he
11 didn't say that when I said hacking and planting,
12 perhaps he was being literal because maybe he
13 didn't use the verb plant but he certainly used the
14 word hack and by that statement, not certified
15 under Rule 11, I don't know what the good-faith
16 basis in fact is for it.

17 THE COURT: Well, we'll find out.

18 MR. SNYDER: He is accusing my client of
19 hacking into a computer, a criminal act, to send
20 the authentic StreetFax contract to Sidley and
21 Austin, an audacious and outlandish claim if
22 there's no evidence for it, and there is no
23 evidence.

24 THE COURT: We'll explore that further. A
25 ten-minute break.

1 MR. BOLAND: Thank you, your Honor.

2 (Short recess was taken.)

3 THE CLERK: Continuation of Rule 16(b)
4 hearing and oral argument on defendants' motion to
5 stay discovery.

6 THE COURT: By the way, on that
7 Rule 16(b), the reason this is a Rule 16(b)
8 conference is because -- this is not criticism --
9 contrary to what we were told back in December, we
10 did not see the imminent motion to dismiss. And I
11 realize, now that I see it, why that would be. But
12 not having heard anything, I felt rather than start
13 communicating with defendants in a way that would
14 suggest in any shape or form favoritism, I would
15 just put out a Rule 16(b) invitation and see what
16 happened. And this is what happened. So --

17 MR. SOUTHWELL: We appreciate that, your
18 Honor. As I said, we were hoping to file in
19 September, and -- and when we saw --

20 THE COURT: In January.

21 MR. SOUTHWELL: In September of 2011 we
22 actually we thought --

23 THE COURT: Well, I know, but --

24 MR. SOUTHWELL: -- we would file
25 originally, and then in January, but we kept on

1 finding the evidence under the rocks.

2 THE COURT: I understand -- well, no, no
3 it's not a criticism. I just want to comment as to
4 why the Rule 16(b) invitation was sent. It wasn't
5 because I felt that there had to be a Rule 16(b)
6 conference. But I felt I had not received any
7 indication from defendants about the imminency or
8 lack thereof --

9 MR. SOUTHWELL: Yes, your Honor.

10 THE COURT: -- of the motion, and
11 therefore my obligation as the case management
12 Judge was to issue the order. It was not because
13 Judge Arcara, contrary to Mr. Boland's belief,
14 directed it.

15 MR. SOUTHWELL: Thank you.

16 THE COURT: Oh, by the way, just to let
17 you know.

18 MR. BOLAND: I was commenting on the
19 preamble to the order.

20 THE COURT: I know.

21 MR. BOLAND: I misunderstood.

22 THE COURT: I know. That's just a minor
23 point. I just wanted to clear the air on that --

24 All right. Mr. Boland and Mr. Dumain, you have
25 the floor.

1 MR. BOLAND: Your Honor, as --

2 THE COURT: How do I ignore all of the
3 seemingly persuasive indicia or troublesome
4 indicators of potential fraud?

5 MR. BOLAND: One way, your Honor, is full
6 discovery for our side, because you haven't heard
7 half the story. So it's like the old law school
8 analogy, you come around the corner -- you heard a
9 gun shot, you run around the corner, and there's a
10 person lying there bleeding and someone over them
11 holding a gun. What's your first reaction? Wow,
12 they just shot them. And then you walk up and ask
13 the person what happened, and it turns out later
14 they're telling the truth, and they say someone
15 just walked by and shot my friend. Totally
16 different story.

17 THE COURT: Yeah, but if you have a
18 confession --

19 MR. BOLAND: My point is, your Honor, your
20 first instinct about something is not always the
21 right one until you get the other half of the
22 story.

23 THE COURT: I see. So, do -- do any of
24 your experts say that the -- or do you say that the
25 StreetFax contract that was discovered in the

1 plaintiff's emails with Mr. Kole is a fabrication
2 in itself and is not the original contract?

3 MR. BOLAND: Well, the defendants have
4 offered no evidence to authenticate the document.

5 THE COURT: What do you say?

6 MR. BOLAND: Well, what I say, your Honor
7 is first of all, the metadata -- we've only had
8 what four or five days to review what you pointed
9 out is hundreds of pages.

10 THE COURT: But the StreetFax contract has
11 been submitted to you since last summer.

12 MR. BOLAND: Yes, your Honor. On that
13 point I can speak. We've had --

14 THE COURT: That's the point I'm talking
15 about.

16 MR. BOLAND: Well, we weren't sure what
17 their motion to dismiss was going to --

18 THE COURT: Is it a fraud?

19 MR. BOLAND: -- to discuss. Is the
20 document was not created by our side, so whoever
21 created a fraudulent --

22 THE COURT: Well, I mean, you've had --
23 excuse me.

24 MR. BOLAND: A fraudulent document, yes.
25 It's not the contract between these two parties.

1 THE COURT: Have your experts reviewed it?

2 MR. BOLAND: The document itself?

3 THE COURT: Yes.

4 MR. BOLAND: Yes, we have experts who have
5 looked at it. And we're going to have expert
6 reports as part of our response.

7 THE COURT: And do they say it's a fraud?

8 MR. BOLAND: They indicate that it claims
9 to be a scan, but has no metadata of being a scan.
10 That's a problem.

11 THE COURT: Has no metadata of being a
12 scan.

13 MR. BOLAND: Scanners, when you scan a
14 document into electronic format, put -- typically
15 put metadata into that file including the name
16 Canon scanner, HP, Epson, whatever it might be.
17 The defendants claim that document was scanned by
18 someone. Mr. Ceglia is their target of choice,
19 although they have no evidence he created that
20 document at all. And yet the metadata embedded in
21 that document strangely has the information
22 regarding the scanner stripped out by someone. So
23 who -- who took that out? Perhaps the defendants
24 know about the use of a hex editor in the
25 production of that document, but we certainly

1 don't.

2 So now it's not even clear that document was
3 scanned by anyone.

4 THE COURT: But it also was found on one
5 of Mr. Ceglia's drives, wasn't it?

6 MR. BOLAND: No, your Honor, that's a good
7 point. The persuasiveness that you asked about
8 should connect somehow to the credibility of what
9 you're hearing. That, in fact, is something the
10 Court is being misled about in pleadings
11 constantly. The defendants are very careful to not
12 delineate what evidence they're finding on my
13 client's computers and what evidence they're
14 finding on his parent's computer, a computer that
15 he never had access to, he never owned, he never
16 purchased.

17 THE COURT: So the parents sent Mr. Kole
18 the document even though your client, on the
19 record, asserted a an attorney-client privilege
20 between himself and Mr. Kole as to the document.

21 MR. BOLAND: Your Honor, I am not
22 saying --

23 THE COURT: Not inconsistent?

24 MR. BOLAND: It's not inconsistent and
25 here's why.

1 THE COURT: Because?

2 MR. BOLAND: Because the privilege logs
3 that we obtained and the documents therein, first
4 of all, were reviewed by prior to counsel simply
5 say from lawyer to client. And then the contents
6 therein are reviewed, and then there was an
7 assertion of privilege made based on whatever
8 communications Mr. Lake and Mr. Ceglia had on that
9 matter.

10 THE COURT: No, no, Mr. Kole and
11 Mr. Ceglia.

12 MR. BOLAND: I understand, your Honor.
13 I'm talking about the privilege assertion in this
14 case.

15 THE COURT: The privilege assertion was
16 between -- by Mr. Lake --

17 MR. BOLAND: Yes.

18 THE COURT: -- on behalf of Mr. Ceglia,
19 that the communication wherein the -- what the
20 defendants call the smoking gun actual StreetFax
21 contract was attached --

22 MR. BOLAND: Correct.

23 THE COURT: -- was privileged. And that
24 assertion was made on behalf of Mr. Ceglia by
25 Mr. Lake, and I had to rule on it. And I did. And

1 I overruled it. And Mr. Lake didn't appeal. So if
2 Mr. Ceglia through his agent Mr. Lake is asserting
3 a privilege as to such document, including the
4 StreetFax contract that we are now talking about,
5 purportedly the original and only agreement between
6 plaintiff and defendant, how can it not be said
7 that the document was in your client's possession
8 at the time that was transmitted?

9 MR. BOLAND: First of all, your Honor,
10 this is an email purporting to be from eight years
11 ago.

12 THE COURT: You understand the question?

13 MR. BOLAND: I do understand the question.
14 My client sent a bunch of emails to Jim Kole and
15 has no specific recollection of this email being
16 sent, and he said so on the record.

17 THE COURT: That's not what he told his
18 lawyer to tell this Court back in -- whenever the
19 issue was argued.

20 MR. BOLAND: Well, I don't know what his
21 specific conversation was with Mr. Lake. I wasn't
22 there. But he --

23 THE COURT: Well, you can have asked him.

24 MR. BOLAND: I could have.

25 THE COURT: It's a pretty serious problem,

1 isn't it?

2 MR. BOLAND: I don't think so, your Honor,
3 because I think he can assert privilege over an
4 email that he doesn't recall whether he sent it or
5 not to just say, look, it appears to be a
6 communication with my lawyer, assert the
7 privilege --

8 THE COURT: I distinctly remember
9 Mr. Lake's very, very vigorous argument in that
10 regard, and I don't recall any equivocation on his
11 part relating to his -- Mr. Ceglia's insistence
12 that this was a privileged communication between
13 himself and Mr. Kole. And now you're telling me in
14 that retrospect Mr. Ceglia is saying, well, not so
15 much. I don't really recall it. I have no idea
16 why I told Lake to say all of that. Is that what
17 you're trying to tell me?

18 MR. BOLAND: No, your Honor. What I'm
19 telling you is the email was not sent from my
20 client's email account. It was sent from his
21 parent's email account to the lawyer.

22 THE COURT: Well, a copy of it resided on
23 his hard drive, didn't it?

24 MR. BOLAND: No, your Honor. It resided
25 on his parent's computer. And --

3 MR. BOLAND: No, your Honor. I'm not
4 saying his parents sent the email. An email was
5 sent from their account. I could sit behind your
6 computer -- if you give me your credentials, I can
7 send an email from your account. You didn't send
8 it. That's what we're saying.

13 MR. BOLAND: Your Honor, discovery is
14 going to help perhaps us answer those questions.

19 MR. BOLAND: No, your Honor. It's more
20 straightforward than that. The only person
21 involved in this case who has all of the
22 credentials to access that email account is Mark
23 Zuckerberg. He had them back in 2003 and 2004 when
24 he had --

25 THE COURT: So we're back to the hacking

1 cyber warfare TV show 24 technique argument that
2 Mr. Lake proffered way back last summer, but has
3 never been developed or supported by Mr. Ceglia?

4 MR. BOLAND: No, your Honor. This is one
5 of the key reasons --

6 THE COURT: Or is even in your papers in
7 favor of -- I mean, is that why you want to go into
8 all the computers at Facebook and examine each and
9 every one of them to see whether or not there's
10 some evidence of electronic cyber warfare going on
11 here?

12 MR. BOLAND: That statement was never
13 made, your Honor. So I have no interest in going
14 to every one of Facebook's computers. There was
15 no --

16 THE COURT: I thought --

17 MR. BOLAND: -- demand made. That's
18 Mr. Southwell's recollection of the conversation,
19 or perhaps out of a context comment, whatever he's
20 making.

21 THE COURT: The question withdrawn.

22 MR. BOLAND: No interest.

23 THE COURT: All right. Would you say that
24 all of the experts that are involved in this very
25 voluminous report are incompetent?

1 MR. BOLAND: All of them?

2 THE COURT: Yes.

3 MR. BOLAND: No. One of them is --

4 THE COURT: Who's that?

5 MR. BOLAND: -- for sure. Gerald LaPorte.

6 Who is offering testimony about a test, the PE
7 test, which is the lynchpin of their case, that the
8 interlineations on page 1 are somehow less than two
9 years old. This test -- what they don't tell you,
10 he's -- Mr. LaPorte has been carrying this around
11 to federal and state courts for years trying to get
12 it past Daubert and has failed. He has like the
13 Energizer Bunny of junk science.

14 This test has absolutely no reliability behind
15 it. Again, expert discovery will bring that out
16 and perhaps even a Daubert hearing, because this is
17 not something the Court should rely on. It's
18 akin -- it's not even reliable as astrology,
19 because that's more accurate.

20 THE COURT: How about Stroz Friedberg's
21 finding relative to the apparent fabrication of the
22 so-called Ceglia-Zuckerberg emails regarding
23 StreetFax -- excuse me, regarding Facebook, are
24 they also based on junk science?

25 MR. BOLAND: They're not, your Honor. But

1 what they do is they don't follow the trail all the
2 way to the end. I'll give you a perfect example of
3 what Mr. Snyder brought up in his comments to you.
4 He told you about you couldn't imagine a more
5 egregious conduct by a party than Mr. Ceglia
6 deleting the contents of his getzuch@gmail.com
7 account. On page 25 of Stroz Friedberg's report --
8 it's document 325 at the bottom -- not only if you
9 read those two paragraphs, that's not what they
10 say. They never say there were any emails in that
11 account that were deleted. Mr. Snyder is
12 misleading the Court about what that paragraph
13 says. It's right there in black and white.

14 In addition, they use words throughout their
15 report that are not the words of experts. Like, it
16 is likely this happened. It is presumably the
17 case, which is in this Get Zuch paragraph. The
18 only evidence they have that they put in their
19 report is an email mentions the activation of a
20 Facebook account, and the email address that you
21 have to use to get a Facebook account, as they
22 should know, is included in the reference. They
23 don't say in that paragraph that a getzuch@gmail
24 account email was ever sent from that account.

25 THE COURT: No, no, you didn't catch my --

1 you didn't catch my question. I'm referring to the
2 extensive discussion in the Stroz Friedberg report
3 regarding the question of whether the emails
4 attached to the amended complaint were
5 fabrications.

6 MR. BOLAND: Yes, I am aware of that, your
7 Honor.

8 THE COURT: That's what I'm asking you
9 about. Is that incompetent expert opinion?

10 MR. BOLAND: It is, and I'll tell you why.
11 Because they use the same weasel words in there,
12 same things -- and I've read it once or twice now,
13 and I'll read it again, because they keep popping
14 up. Every time you read the report, you see more
15 qualifiers like this in that specific topic. They
16 say there's no way these emails could have these
17 time stamps because of the difference between
18 daylight savings time, provided the computer clock
19 was correctly set.

20 Well, that begs the question, was the computer
21 clock correctly set? Did someone set it? Did a
22 program reset it? Did Mr. Ceglia travel somewhere
23 to a time zone where he reset it? They have no
24 idea. So, assuming a fact they don't know, which
25 could convert their whole conclusion to nonsense,

1 they then give you this conclusion which appears to
2 be strong. And it's throughout their report, your
3 Honor. Virtually every conclusion they give has
4 they qualifiers.

5 The hex editor is another one. They say a hex
6 editor or similar program was used. Okay. What
7 program? When was it installed? Guess what, your
8 Honor? There's no evidence of a program like that
9 installed anywhere on any computer. So they could
10 have said -- Mr. Snyder's words -- we have evidence
11 that aliens came down and did this. Of course,
12 they have no evidence of aliens involved in the
13 computer at all.

14 And, in fact, a hex editor is so common a
15 program that I used one last week to solve a
16 problem of metadata creation dates in my files
17 being messed up from this case, and from the
18 production from the defendants. Things happen on
19 computers. Programs cause metadata to change and
20 were fouling up my ability to synchronize files.
21 So I used a hex editor to correct the dates on my
22 files. It's very commonly used for a number of
23 issues to correct problems with computers, and the
24 defendants know that.

25 THE COURT: You don't deny that it was

1 found on his -- on some of his Microsoft Word
2 files.

3 MR. BOLAND: What was found?

4 THE COURT: Hex editors.

5 MR. BOLAND: No, your Honor. The report
6 does not -- the report says that the contents of
7 some Word documents had words like hex editor in
8 them. I'm testing things with a hex editor.

9 There's no evidence a hex editor was used. What
10 they say is, you know, the metadata of some of
11 these files --

12 THE COURT: Why would somebody using the
13 computer assert the usage of a hex editor if they
14 weren't using it? And I had the impression from
15 the report, and as explained further by
16 Mr. Southwell, that the objective indicia of such
17 use confirmed that indeed it was used by
18 Mr. Brendan Ceglia.

19 MR. BOLAND: Your Honor, it doesn't
20 confirm it. It's subjective entirely. They find
21 things like metadata which doesn't look right and
22 then they simply conclude hex editor is the
23 solution.

24 THE COURT: All right. We'll go further
25 with this.

1 MR. BOLAND: Very well.

2 THE COURT: What I'm trying to understand
3 is, if you have all of they powerful counter
4 arguments that, in your opinion, undermine the
5 competency of these expert -- plethora of expert
6 opinion, why isn't it your papers? Why do you -- I
7 mean, you now say well, we're back to the fact that
8 the StreetFax contract was somehow embedded
9 improperly in Mr. Ceglia's -- well, in the parent's
10 computer, that it didn't exist on his hard drive.
11 You don't address the fact that if he -- that if
12 the Work for Hire contract was authentic, why is
13 there no electronic record of it in any of his --
14 in any of the media that he turned over to the
15 defendants for examination? There's utterly no
16 comment on that, Mr. Boland, in your papers.

17 MR. BOLAND: Your Honor, the defendant --

23 THE COURT: And what's that?

24 MR. BOLAND: The defendants have had nine
25 months to put together these hundred pages. We've

1 had less than less than nine days to go through.

2 THE COURT: That's not true. You've had
3 all of the paperwork, all of the discovery at your
4 disposal since the lawsuit was started.

5 MR. BOLAND: Your Honor --

6 THE COURT: You've had experts look at it
7 preliminarily. You knew that they were going to
8 make this motion to dismiss, although it took them
9 longer than expected. And now you're telling me
10 that you're surprised by all of this expert
11 analysis and accusation?

12 MR. BOLAND: No, your Honor, that's not my
13 point. My point is the conclusions in their
14 hundreds of pages of reports are --

15 THE COURT: Let me put it to you this
16 way --

17 MR. BOLAND: -- are very specific
18 things --

19 THE COURT: Are you saying that none of
20 your experts or any experts that you might retain
21 or intend to retain to prosecute this case have
22 offered to you any preliminary opinions supporting
23 the authenticity of this contract?

24 MR. BOLAND: Yes, they've already provided
25 them in prior pleadings. There's issues in dispute

1 with their various expert reports, the toner, the
2 paper, the ink, Mr. Zuckerberg's signature, the
3 staple hole issue. They're merely rebutting stuff
4 in most of those papers that we've already
5 submitted in declarations to be the opposite, the
6 classic dueling experts. It's already there. We
7 need discovery to fully address every specific
8 opinion they issued there, and frankly --

9 THE COURT: You might need a deposition.
10 You got their report in effect. But what other
11 discovery, if you will, do you feel you need in
12 order to counter act this avalanche of -- of
13 evidence pointing towards the conclusion that the
14 defendants are drawing, which is that the document
15 on which your client is suing is a fake?

16 MR. BOLAND: First of all, your Honor, it
17 won't be an avalanche once we have a full
18 opportunity to explore a bunch of conclusions in
19 there that, frankly, we didn't anticipate, because
20 they're not supported by science. Our experts
21 didn't think, for example, that one of their
22 experts would come forward with a PE test that is
23 complete junk science, and then try to support
24 their entire case with that.

25 So now they've done so. Now our experts need

1 time to not only respond, but that expert needs to
2 be held to account in a deposition and full
3 discovery as to why he did that. In addition, the
4 comments that were being made by Mr. Lesnevich
5 where he claims to have drawn lines on letters, and
6 then the conclusion he drew, there must be another
7 paper document. That's the only solution. That
8 conclusion --

9 THE COURT: No, that's not the conclusion.
10 The conclusion is that if there was only one
11 authentic document, how can there be two that --
12 and we know there are more than one because of the
13 difference in the lettering.

14 MR. BOLAND: Correct. But what he ignores
15 in there --

16 THE COURT: But that's the point.

17 MR. BOLAND: We had no idea that they were
18 going to make that conclusion. Here's why.
19 Because it's not supported by anything they have in
20 their evidence. What he ignores, for example, your
21 Honor, is there are more than 20 parts of those two
22 compared pieces of writing that are exact
23 duplicates that are incapable of a human being
24 creating them exactly. So what the logical
25 conclusion will be from our experts is, the result

1 of these differences that he points out are created
2 by machines scanning and scanning and quality of
3 scans, and it could not possibly be a human writing
4 those words twice on two different documents that,
5 in the majority of their aspects, they completely
6 overlay.

7 No expert on our side or their side is going to
8 say a human being can write a sentence twice and
9 have the majority of it or any of it be an exact
10 duplicate, overlay perfectly. And most of those
11 words do, which tells you a human being didn't do
12 that. There are two scans. Let me just emphasize
13 that for the record.

14 THE COURT: Two scans of what?

15 MR. BOLAND: Lesnevich in his report is
16 examining two scans, two electronic documents and
17 saying because I see differences in these, I
18 conclude there's two different underlying paper
19 documents. That conclusion is not supported by
20 anyone in his field at all. It won't pass Daubert,
21 and that's why we need full discovery definitely on
22 the experts for that issue. And all the issues
23 that they raise, the toner, the paper differences,
24 the staple holes. We have to go after all of them
25 because they're simply either going to be proven to

1 be wrong, or at the very least, our experts will
2 have all the credible testimony needed to
3 demonstrate that this is a jury question.

4 THE COURT: Well, what testimony --
5 what -- I'm listening carefully. I'm trying to
6 understand. Conceivably what -- for example, in
7 Mr. LaPorte's case because of this evaporation it's
8 this ink evaporation issue, is that what you're
9 referring to?

10 MR. BOLAND: Yes, called a PE test,
11 commonly is what I've learned in the last nine
12 days.

13 THE COURT: I read about that. All right.
14 Query, what would be gained by deposing Mr. LaPorte
15 about that test?

16 MR. BOLAND: I'll give you an example.

17 THE COURT: How does your expert need --
18 what would your expert need to know from
19 Mr. LaPorte to enable your expert to say that it's
20 an incompetent test. You already know it is.

21 MR. BOLAND: No, it's the reverse.

22 THE COURT: Presumably your expert knows
23 it.

24 MR. BOLAND: That's their evidence. Their
25 expert should tell us what is the basis for that

1 opinion. He has to support it.

2 THE COURT: He's given it to you. You say
3 you know that it's incompetent. It's not -- it's
4 not accepted. So your expert will be able to say
5 under oath it's not accepted, and here's I why.
6 What possible deposition testimony would you gain
7 from Mr. LaPorte that you don't already know he
8 based on the documentation that's before us as a
9 matter of record?

10 MR. BOLAND: His credibility as a witness
11 is in issue. And when he can't answer questions
12 about the basic fundamentals that he claims
13 underlie that test, that's something important for
14 the Court to understand. These aren't two equal
15 experts. It's somebody who is trying to pull the
16 wool over the Court's eyes with this venire of
17 science, and he needs to be held to account for
18 that, explain it. And when he says, you know, I
19 really don't know, and what we've already found in
20 the short few days that we've been able to examine
21 his report, and his -- the background on this test
22 that he used, which, frankly, we're surprised the
23 defendants are basing their case on it, is that he
24 has in different depositions claimed that this test
25 was reliable back starting 2002. In another case

1 he said well, it wasn't reliable until 2005. And
2 in yet another case he said it wasn't reliable
3 until 2008. His credibility is in issue. And that
4 credibility can't be brought out.

5 THE COURT: So you suspect if you depose
6 him, he'll stutter and stammer hem and haw and
7 refuse to answer and can't answer, don't know, and
8 so forth, and his credibility as an expert will be
9 destroyed, and he'll have to go into some other
10 line of work. Is that what you think is going to
11 happen?

12 MR. BOLAND: I think he'll be exposed as
13 trying to offer something on this Court that
14 doesn't meet the standard under Daubert. And the
15 Court can't rely on it in a motion to dismiss. And
16 if we just submit our report, the Court doesn't
17 know the full omissions that are in his report
18 without him having to account for that.

19 And Lesnevich as well. He makes a conclusion
20 that no one in his field makes. He should be
21 required to support it.

22 THE COURT: How can you say that? Because
23 you just told me you haven't had any other experts
24 examine the documents on that very point.

25 MR. BOLAND: Our experts have been able to

1 read his report and say no one uses that analysis
2 to conclude --

3 THE COURT: So it's not true that you're
4 totally hamstrung here in terms of responding.
5 Your experts have reviewed this voluminous
6 document. You just said that.

7 MR. BOLAND: The handwriting -- the
8 Lesnevich report's been reviewed, the LaPorte
9 report has been red by them, yes.

10 THE COURT: Does that mean reviewed?

11 MR. BOLAND: I would say so.

12 THE COURT: Okay.

13 MR. BOLAND: And they're constantly coming
14 up with new information every time they go through
15 it that needs to be addressed by these witnesses.

16 THE COURT: Why wasn't any of that put in
17 your papers?

18 MR. BOLAND: Because, your Honor, we've
19 only had a few days to find out --

20 THE COURT: Well, yes, but, what, you just
21 found out this morning or over the weekend after
22 this was filed with the Court on Sunday?

23 MR. BOLAND: That -- that paper only
24 addressed whether they're entitled to a delay or
25 not. We're not prepared to argue the merits of the

1 motion to dismiss today.

2 THE COURT: I'm not. I'm trying to
3 understand the potential merits, that's what I'm
4 required to do, aren't I?

5 MR. BOLAND: Yes, your Honor, and the
6 point we're making is you can't understand them
7 until we get discovery necessary to every issue
8 they've raised, and they raised issues beyond --

9 THE COURT: Oh, you --

10 MR. BOLAND: -- what they claim.

11 THE COURT: -- you certainly are going to
12 have an opportunity to respond to the merits of the
13 motion. I have to basically look under the covers
14 and take a peek-a-boo at the strength of all of
15 this material, which I have done. And what I'm
16 listening to you say is that so have you. But
17 interestingly none of what you're telling me now in
18 oral argument is in any way alluded to in your
19 papers.

20 MR. BOLAND: I understand that, your
21 Honor, but there's a fundamental unfairness here
22 for us to have the short period of time and try to
23 cobble together a response to their nine months of
24 work.

25 THE COURT: But you agreed to the

1 scheduling order.

2 MR. BOLAND: For the issue about deferring
3 or delaying discovery, yes.

4 THE COURT: You agreed to the scheduling
5 order for today's hearing. There was no request to
6 adjourn today's hearing to give you more time to
7 respond to their motion to stay discovery.

8 MR. BOLAND: On that issue --

9 THE COURT: Did you?

10 MR. BOLAND: No, we did not.

11 THE COURT: Well then, how can you now
12 stand here and say that you're hobbled and you're
13 being compromised in terms of your ability to
14 respond?

15 MR. BOLAND: Because the basis you're
16 using to analyze whether their motion is solid or
17 not is essentially, please respond, Mr. Boland, to
18 65 pages of a brief and 400 pages of exhibits, and
19 do it now. That's what the discovery will be for
20 is to show the Court that that document you have
21 there, which looks -- which is half the story,
22 looks so persuasive is going to look like every
23 other case that goes to a jury, and there's going
24 to be experts and evidence on every point that they
25 make that the Court is currently persuaded by, and

1 we have not had a full opportunity to explore.

2 THE COURT: Because you're going to -- for
3 example, as to the Work for Hire agreement you're
4 going to put a document request out on
5 Mr. Zuckerberg for a copy of that contract, is that
6 it?

7 MR. BOLAND: We think Mr. Zuckerberg needs
8 to come forward with the copy of the contract he
9 has or --

10 THE COURT: He said he doesn't have any
11 such contract under oath.

12 MR. BOLAND: He said he never --

13 THE COURT: Because he never signed such a
14 thing.

15 MR. BOLAND: If you read his declaration,
16 your Honor, he says I never signed an agreement
17 involving Facebook. We want him to be deposed and
18 explain what -- through discovery, did he sign the
19 two-page document that is the authentic contract?
20 Hand it to him with gloves on and ask him to say.
21 He's never said that. They made a representation
22 in their motion that he did. If you look at the
23 reference, it's Mr. Snyder saying that he, you
24 know, did or did not or we're not sure.
25 Mr. Zuckerberg has to come in and say I didn't sign

1 it. So far -- and I'm talking about the specific
2 document that my client's alleging is the actual
3 contract.

4 THE COURT: Somehow I recall a declaration
5 to the effect that what you purport -- what
6 plaintiff purports is the actual contract, i.e. the
7 Work for Hire contract was never signed by
8 Mr. Zuckerberg. I don't know why I'm recalling
9 that.

10 MR. SNYDER: You're correct, your Honor.

11 MR. BOLAND: My recollection of the
12 declaration --

13 THE COURT: At my age, who knows. It's
14 possible that I'm not as sharp as I should be.

15 MR. BOLAND: A clearer declaration would
16 be an exhibit during a deposition where he is
17 handed with gloves on the actual two-page document
18 and says once and for all, I did not sign that
19 page 2. That's not -- that is not the contract I
20 signed. He has not done that yet. In fact, he has
21 not even said that the -- under oath, that the
22 document attached to the Kole email is the contract
23 that he signed. They have offered no experts, no
24 experts to declare that that document is the
25 authentic document. That's an important omission

1 from their filing so far. No expert has said
2 either that the StreetFax -- what they're calling
3 the StreetFax contract is authentic. No expert
4 said that. Or that Mr. Zuckerberg signed that
5 document. No expert said that either.

6 THE COURT: Yeah, but there's an
7 implication of that, and I tried to get at it
8 earlier with regard to the contemporaneity of the
9 undisputed execution of the spec by Mr. Zuckerberg
10 with the contemporaneous timeframe that we're
11 talking, as to the -- well, that's the issue at
12 hand -- and the expert's opinion that that was
13 signed contemporaneously, but the second page of
14 the Work for Hire document wasn't signed
15 contemporaneously.

16 MR. BOLAND: I'm not sure what expert
17 report you're referring to with that. I don't
18 recall that distinction.

19 THE COURT: That would be the Tytell
20 declaration that I alluded to earlier.

21 MR. BOLAND: Our experts have previously
22 already said --

23 THE COURT: So the point I'm making is --

24 MR. BOLAND: -- that the ink matches --

25 THE COURT: -- that it's not true that

1 there isn't some expert opinion about the concept
2 that this StreetFax contract is the authentic
3 contemporaneously executed contract between the
4 parties, which is corroborated by the expert's
5 comparison of the second page of that document with
6 the sixth page of the specification that was dated
7 and signed by Mr. Zuckerberg, presumably on the
8 same date at the same time. So it's -- when you
9 say there's no expert opinion authenticating the
10 StreetFax contract as the true contract between the
11 parties, I don't think that's correct.

12 MR. BOLAND: But their expert --

13 THE COURT: You get my point?

14 MR. BOLAND: Yes, your Honor. I don't
15 recall that specific detail of Mr. Tytell's report.
16 I read it already once, and I've read all of them
17 once, but it's a lot of material, as the Court
18 knows. But be that as it may --

19 THE COURT: That's a pretty decisive
20 point. I don't know why I'm interested. I'm
21 apparently the only one in the courtroom that's
22 interested in it.

23 MR. BOLAND: Because it's a --

24 THE COURT: No one else is interested.
25 Just like I was interested in the hex editor.

1 MR. BOLAND: It's flawed science comparing
2 a piece of paper and a digital image. That's the
3 problem with it. The guys in Tytell's industry in
4 his field, as our experts will come to tell you,
5 don't do that. They are doing all kinds of things
6 in this case that they've never done.

7 THE COURT: Tytell didn't have the
8 original of the spec?

9 MR. BOLAND: No, he's comparing the
10 original of the spec with a digital image of what
11 they call is the real contract is what you just
12 laid out. The experts don't do that and say that
13 the digital image is real. They might say the
14 original --

15 THE COURT: We don't have the original of
16 the StreetFax contract, is that right?

17 MR. BOLAND: No. And if Mr. Zuckerberg
18 who claims that's the real contract had that
19 document, which he so far concealed from the Court,
20 because he's never given a statement like
21 Mr. Ceglia was required. Where is it? If you
22 don't have it, what did you do with it? When did
23 you do that with that? How hard have you looked
24 for it? Mr. Ceglia was required to do all that
25 regarding some USB drives which the defendants have

1 no evidence have anything relevant to this case.

2 This document is completely at the heart of
3 this case, and if it were true, the case would be
4 over. So it's very interesting that they don't
5 come forward with an explanation of where that
6 document is, except Mr. Snyder, who is not a
7 witness and not under oath, spouting about how 18
8 year Olds leaving college throw their papers aside,
9 which may or may not be an interesting fact about
10 college students. That's not Mr. Zuckerberg saying
11 here's what I did with it, here's how hard I looked
12 for of it, and I don't have it. And you even
13 alluded to that, your Honor, at a prior hearing
14 saying did he check his parents attic? Who knows.
15 But that document is missing. And it was missing
16 at a time when he and Ceglia, according to the
17 defendants had a legal dispute going.

18 THE COURT: That assumes there was a
19 duplicate copy.

20 MR. BOLAND: Mr. Zuckerberg has admitted
21 he received a copy of the document.

22 THE COURT: A duplicate original I should
23 say.

24 MR. BOLAND: Yes. He's admitted he
25 received a copy of that document that he signed on

1 that date. He has admitted that.

2 THE COURT: A copy, but the original then
3 per force that implies that Mr. Ceglia had the
4 original.

5 MR. BOLAND: There might have been two
6 originals signed by both of them. I don't know the
7 detail on that. That's one thing that hasn't come
8 out in either of our papers. I'll find that out
9 for you.

10 But nonetheless, your Honor, that document was
11 subject to litigation at the time that
12 Mr. Zuckerberg disposed of it, if he even disposed
13 of it when he was 18 or 19 leaving Harvard. So
14 there's an issue there under Second Circuit case
15 law with regard to whether that counts as
16 spoliation of that document. Because there was an
17 ongoing legal dispute between him and Mr. Ceglia
18 over the StreetFax payments, et cetera, and that is
19 one of the concerns that we have. That he's
20 allowed to destroy, discard, and say dog ate my
21 homework on the key document in this case, and then
22 attempt with these experts and weasel words to
23 shoot from the weeds that an original we have which
24 you can look at and everyone in this room, with
25 gloves on, can take a look at.

1 And it's -- these experts are purporting to do
2 something monumental that's never been done, and
3 that is try to persuade the Court that a real piece
4 of paper that experts have looked at and are
5 disputing, I'll agree with that. Their experts are
6 now disputing what ours say about the authenticity
7 of it. This one's fraudulent because we found a
8 digital image somewhere that nobody knows how it
9 got there, nobody knows whether it was scanned or
10 not, nobody knows it's providence whatsoever. But
11 trust us, your Honor, that digital image is the
12 real one, and this thing right in front of you,
13 that's a fake even though the experts disagree on
14 whether it is. And that's the basis of their fraud
15 (indiscernible).

16 THE COURT: Would you agree that if there
17 was an electronic version of the Work for Hire
18 contract, an electronic version of it created by
19 not Mr. Zuckerberg, but by your client, and it
20 would seem that he was the author of these
21 documents -- of that document, correct?

22 MR. BOLAND: Yes, your Honor, there are
23 those documents. They exist.

24 THE COURT: There is an electronic version
25 of the Work for Hire contract in your client's

1 possession on one of his computers?

2 MR. BOLAND: Yes. Let me clarify.

3 There's not --

4 THE COURT: Yes?

5 MR. BOLAND: There's not one signed.

6 There's not one signed. There's the Word documents
7 that he used to eventually printout and have
8 Mr. Zuckerberg sign. They talked about those in
9 Stroz Friedberg's report claiming backdating on
10 those documents.

11 THE COURT: The so-called test forgeries?

12 MR. BOLAND: Yes, that's their claim of
13 that. But let me talk to you about that, your
14 Honor, because this backdating issue is again a red
15 herring. I just mentioned earlier, I had to use a
16 hex editor myself a week ago, and I'll tell you
17 why. Because I'm downloading documents from this
18 case off of ECF, I'm getting productions from their
19 experts, and I'm getting other files from prior
20 counsel, and all of a sudden my computer won't
21 synchronize them. And guess what I found out, your
22 Honor? A bunch of those documents when they landed
23 on my computer have creation dates of 2004 and
24 1969, predating the development of an iPad or
25 anything else.

1 So something went haywire with the programs on
2 my machine and started redoing create dates to my
3 files. I'm not backdating my computer. Stuff
4 happens on computers. And what Stroz Friedberg
5 wants you to believe is there's a book somewhere
6 with every possible way a file can be backdated,
7 and we've checked off every one. And you know what
8 one's left? Forgery, that's it. Nefarious. But
9 that's false. And they know it's false.

10 They know that there are so many variables on
11 computers, especially a computer they never had
12 access to as it operates, there's no way they can
13 say the only way these got backdated is some evil
14 intent by the person operating that program.
15 That's just patently false. I had backdated
16 documents that I used a hex editor to fix so I
17 could have them on my iPad here today. And any
18 legitimate expert would have pointed that out.
19 Just like portions of the report -- I want to point
20 out one other thing, your Honor, that goes to the
21 credibility of Stroz Friedberg and why, when you
22 say avalanche of data, it might be an avalanche,
23 but it's full of a bunch of rocks and wood and all
24 kinds of things that are injurious.

25 For example, on page 15 of their report -- this

1 is the difference between reading the details which
2 we are all doing and some perhaps in the media or
3 defense counsel want to highlight just look at that
4 header, your Honor, under capital A, the StreetFax
5 contract was found on two different Ceglia hard
6 drives. Now if you stop there, you're thinking,
7 wow, Paul had two computers and these contracts
8 were found on it. But what's the reality? In the
9 paragraph they totally change that 180 degrees.
10 Guess what the two hard drives are, your Honor?
11 One hard drive produced by Mr. Ceglia, actually his
12 parent's hard drive, which they neglect to mention,
13 and a forensic copy of that hard drive.

14 So this is the misleading nature of this
15 report. And these are only some of the things that
16 we found in this short time looking at the report,
17 and there's plenty more to be found. These
18 conclusions are exaggerated. Some have, as I
19 mentioned before, these words like "presumably",
20 "it's likely", "we can't think of another reason".
21 Well, they can't think of another reason because
22 they're advocates, they're not experts. This is
23 not a legitimate expert report, which advocates --

24 THE COURT: Your experts are experts, not
25 advocates?

1 MR. BOLAND: They're not. They're going
2 to call it like they see it. That's the only
3 experts I've ever dealt with. I've had experts
4 tell me before, you know what, Mr. Boland, I've got
5 bad news for you and your client. I got good news
6 for you and your client. I have no news. I don't
7 know what happened. Experts who do advocacy like
8 is replete in this report --

9 THE COURT: Hired guns.

10 MR. BOLAND: -- that's an issue of
11 credibility.

12 THE COURT: Hired guns.

13 MR. BOLAND: I don't know if you call them
14 hired guns, but they're former prosecutor working
15 with a former prosecutor, and this is a piece of
16 advocacy. It's basically a lawyer's document to
17 further argue the case, because when you say
18 there's no way these things can be backdated except
19 forgery or some nefarious tasks, and you know for a
20 fact that things like I just described to you
21 happen everyday with people's computers, you're
22 being an advocate. You're not telling the truth.
23 You're misleading and omitting things.

24 Just like when Mr. Snyder stood up, I don't
25 know an hour or so ago, and tried to make you

1 believe that Mr. Ceglia had sent emails from that
2 Get Zuch email account and then deleted them. It's
3 false. Stroz Friedberg says right in their report
4 not a single thing about an email out of that
5 account. And you know what the January 28th
6 reference is to? That's an email Mr. Ceglia was
7 required to send from the account to Google's legal
8 department, because that's what was required for
9 the consent, so that the legal department could
10 grab the contents of the account that he never used
11 and gave it to them. Now they don't believe they
12 never used it.

13 THE COURT: Are you talking about the
14 deleted account?

15 MR. BOLAND: There's not a deleted
16 account, your Honor.

17 THE COURT: There's not. They were
18 misinformed by Google that it was deleted?

19 MR. BOLAND: Google did not tell them it
20 was deleted. Stroz Friedberg is misleading you --
21 actually not Stroz Friedberg. Stroz Friedberg is
22 kind of using some weasel words that there may have
23 been emails.

24 THE COURT: Well, was the account deleted
25 or not?

1 MR. BOLAND: No. The account was there,
2 live.

3 THE COURT: Can we get a copy of it then?

4 MR. BOLAND: They have a copy. He never
5 used it. Your Honor, I can set up an email account
6 and never send an email. There's none wrong with
7 it.

8 THE COURT: Why would you do a thing like
9 that?

10 MR. BOLAND: That's something to figure
11 out down the road. I have no idea why.

12 THE COURT: You don't do that.

13 MR. BOLAND: Pardon me?

14 THE COURT: You don't do that.

15 MR. BOLAND: No, I use my emails accounts
16 to send emails back and forth.

17 THE COURT: Sure.

18 MR. BOLAND: My point is, Mr. Ceglia had
19 up to now we have eight or nine email accounts.
20 Another factor where Mr. Snyder says he lied to
21 you, he concealed. He has up to eight email
22 accounts that he had in the past, including two
23 that their clients set up for him back in '03 and
24 '04 that Mr. Ceglia didn't remember. It's
25 legitimate that they didn't remember them since

1 their client didn't remember them, and he's the one
2 who set them up for him.

3 THE COURT: And they never told him that
4 they had set them up, is that what you're saying?

5 MR. BOLAND: I'm not saying what
6 communication there was. But if their client set
7 up the email and my client was supposed to use it,
8 the fact that my client didn't remember it means
9 it's concealed?

10 THE COURT: Zuckerberg set up email
11 accounts for Mr. Ceglia --

12 MR. BOLAND: Yes.

13 THE COURT: -- as part of the StreetFax
14 project?

15 MR. BOLAND: Yes. And it was in
16 Mr. Ceglia's declaration. I don't remember which
17 one recently. But we told them that. We said, oh,
18 by the way, there's additional email accounts I may
19 have used, but Mr. Zuckerberg set them up for me.
20 You'd have to talk to him about who the hosting
21 company was that he put them with. So, they didn't
22 mention those. Were they concealing those? Of
23 course they weren't. Mr. Zuckerberg didn't
24 remember doing that, I presume, back in '03. I'll
25 give the guy the benefit of the doubt.

1 But when it comes to Mr. Ceglia, he's over
2 there huddled around all this information, you
3 know, that he knows about, and he's not giving it
4 to the Court. Well, it's kind of interesting how
5 the same factual scenario they paint a different
6 way.

7 THE COURT: So all of these analyses by
8 Stroz Friedberg about the fabrication of the
9 purported Zuckerberg-Ceglia emails going back
10 to 2003 are -- we should discard -- I mean, I
11 should be unpersuaded by them.

12 MR. BOLAND: No, the analysis --

13 THE COURT: For example, I remember one of
14 them -- one of the points they made was that one of
15 the purported email communications that your client
16 allegedly, I don't know, downloaded or copied to
17 some sort of floppy was a communication between
18 Zuckerberg and Ceglia about the startup of the
19 Facebook website.

20 MR. BOLAND: Right.

21 THE COURT: And according to the email
22 which Mr. Ceglia has said is authentic, Zuckerberg
23 said well we just went -- we just started up the
24 website.

25 MR. BOLAND: Right.

1 THE COURT: And Zuckerberg says to him
2 well, come and look at it. And of course the date
3 and the time show that it was operational in the
4 morning of some date, when history has recorded
5 that it was operational in the afternoon. And
6 Ceglia not being a Harvard student would never had
7 access to it. So that email is authentic?

8 MR. BOLAND: Well, your Honor, you just
9 added in two pieces of information that are not in
10 the record under any declaration, that that Harvard
11 server was live at a particular time and date.
12 There's no documentation from an expert, but more
13 importantly, Mr. Zuckerberg saying I'm going to say
14 under oath this is the date and time I did it.
15 They referenced a newspaper article which says
16 well, the server went live at this time. But what
17 about what Mr. Zuckerberg has to say about I let a
18 bunch of people, which everyone knows is done with
19 a new software service. You just don't roll it out
20 there and say I hope it works. You have tons of
21 beta testers they call him. His friends, Eduardo
22 Saverin, Dustin Moskovitz, the other individuals
23 who testified under oath in the ConnectU case and
24 the Saverin case which are other records that we
25 need to access for this issue which they've raised.

1 When did Facebook go live? They raised the issue
2 as a fact.

3 Well, we're entitled to discovery. And there's
4 discoverable information in both those cases. In
5 addition, there would be discoverable information
6 on the computers Mr. Zuckerberg used at that time
7 to run the Facebook server out of his dorm room.
8 And we know where those computers are. There's no
9 cost or burden issue here. Those are preserved
10 allegedly and their originals are.

11 THE COURT: I know I'm jumping around a
12 little bit. I apologize for that. You're -- very
13 interested in your comments. I forgot which expert
14 it was that commented on the difference in the
15 toner application between page 1 of the purported
16 Work for Hire --

17 MR. BOLAND: Yes, your Honor.

18 THE COURT: -- and page 2.

19 MR. BOLAND: Yes. Here's just one of the
20 problem with that.

21 THE COURT: Page 2 opinion is that the
22 type of toner and application that was used was not
23 available in 2003.

24 MR. BOLAND: And they're merely rebutting
25 our expert who has already said he has an entire

1 library of toners, and he put it to a specific
2 printer from that time. It was only available
3 from 2000 to 2005. So their expert says that's
4 wrong.

5 Well, our expert has already declared, I can
6 tell you it's right. I have the library of ink
7 standards or toner standards from them, and that's
8 when it's from. That's dueling experts, your
9 Honor. That's not sufficient for any of this that
10 they put out.

11 So I think you can see in just the few days
12 I've had to confer with experts, review these
13 documents, confer with the other lawyers, legal
14 research.

15 THE COURT: I can't recall which expert,
16 you're talking about Aginsky maybe or which expert
17 is it that offered the opinion about the
18 commonality of the toners?

19 MR. BOLAND: From our side?

20 THE COURT: Yes.

21 MR. BOLAND: The expert was Larry Stewart
22 in a declaration he filed. I don't recall the
23 document number off the top of my head. But he
24 specifically outlined his analysis of the toner,
25 and he didn't just, well, it's the same. He gave

1 them make and model of the printer that used that
2 toner and when it was manufactured.

3 THE COURT: Would -- I forget which expert
4 it is on the defendants' side that commented on the
5 difference in the font between page 1 of the Work
6 for Hire instrument which is at issue here and
7 page 2.

8 MR. BOLAND: Mr. Romano.

9 THE COURT: Professor Romano perhaps?

10 MR. BOLAND: I don't know if he's a
11 professor or not.

12 THE COURT: He's the head of the
13 something.

14 MR. SOUTHWELL: Professor at RIT.

15 THE COURT: At RIT. He certainly doesn't
16 sound like a hired gun, but beside that, he in his
17 opinion said that the first page that the Work for
18 Hire so- called contract is in New Roman, the
19 second page in is Garamond. The StreetFax contract
20 which the defendants claim is the -- is the actual
21 contract both pages are in Garamond. Do you recall
22 that?

23 MR. BOLAND: You already responded to
24 this, your Honor, in a prior hearing on the record
25 where you said to the defendants well, when people

1 put together documents from multiple sources, which
2 has been my client's declaration in this case,
3 copy, paste, copy, paste, let's make a document,
4 these are exactly the kind of differences you find.
5 Moreover, your own staff could tell you that when
6 they save and open and import Word documents, it is
7 a common feature of doing that that fonts get
8 changed, and you're in a middle of the document,
9 and all of a sudden the font's different.
10 Microsoft Word does that all the time. There's no
11 nefarious behavior.

12 THE COURT: But Professor Romano says the
13 whole page was New Roman and the second page was
14 Garamond.

15 MR. BOLAND: The same response, your
16 Honor. The difference in fonts --

17 THE COURT: I mean, if it's a document
18 that was signed authentically and honestly on a
19 certain date of 2003, you're saying that when
20 Mr. Ceglia created the document he used different
21 fonts for the first page, i.e., New Roman, but used
22 Garamond for the second?

23 MR. BOLAND: Well --

24 THE COURT: Does that make sense?

25 MR. BOLAND: Let's assume that analysis by

1 Mr. Romano is correct. He also says in his report
2 that these are incredibly similar, but slightly
3 different fonts. So that's important, your Honor.
4 Visually this document to a non-professor at RIT is
5 not going to look like it's written in some kind of
6 child-like font, and on the back page it's in some
7 kind of script. They're two very similar but
8 slightly different fonts. He even had to zoom in
9 on the fonts in his report to show --

10 THE COURT: That's what he's paid to do.

11 MR. BOLAND: I understand.

12 THE COURT: I mean that's exactly how you
13 go about detecting fraud.

14 MR. BOLAND: But Mr. Ceglia is not --

15 THE COURT: Get down to the details.

16 MR. BOLAND: I understand that. But
17 Mr. Ceglia printed a two-page document. They're
18 both very similar, he went -- let's go to Boston to
19 have signed. There was nothing that would indicate
20 he had made a mistake and cobbled together
21 something that created a different font on a page.

22 Again --

23 THE COURT: It is curious though that
24 Garamond style is -- is apparently according to
25 Professor Romano, the same for the StreetFax

1 document which defendants believe to be the true
2 document.

3 MR. BOLAND: Well, that may or may not be
4 the case, and I'll tell you why. The StreetFax
5 document is of such poor quality, it's hard to even
6 view it. The one that's attached to the Kole email
7 is very difficult to view. So how he can
8 conclude --

9 THE COURT: I think the defendants took
10 the trouble to transpose it under oath I think did
11 they not?

12 MR. BOLAND: But they didn't transpose it
13 claiming they had the right font. They just
14 transposed the content of it.

15 THE COURT: Well, that's the point.

16 MR. BOLAND: But I'm saying to view it
17 visually and say that's all Garamond font, who
18 knows what our expert who now -- that was never an
19 argument they made before. It's new in these
20 series of documents.

21 THE COURT: That's why I raised it.

22 MR. BOLAND: Yes. And there's many others
23 that I certainly --

24 THE COURT: It sounds to me like you have
25 a good possibility of countering the motion to

1 dismiss with contrary expert opinion that would
2 demonstrate the authenticity of the Work for Hire
3 document.

4 MR. BOLAND: There's part of it we can
5 counter with expert opinion. But there's other of
6 it that we have to actually depose their experts
7 and get them to declare how they arrived at certain
8 conclusions, because, frankly, our experts are
9 looking at the report and saying I don't know how
10 he gets there, because they're just so wildly
11 outside of what the field does.

12 THE COURT: Which experts were those?

13 MR. BOLAND: LaPorte.

14 THE COURT: No, no --

15 MR. BOLAND: Lesnevich.

16 THE COURT: -- which experts have already
17 reviewed this document since it was filed on March
18 26th and told you what you just said.

19 MR. BOLAND: They reviewed portions of it.

20 THE COURT: Who?

21 MR. BOLAND: Larry Stewart, Jim Blanco.

22 THE COURT: Anybody else?

23 MR. BOLAND: And we've had -- may I have a
24 moment your Honor to ask Mr. Duman a question?

25 THE COURT: Sure.

1 (Off the record discussion.)

2 MR. BOLAND: Your Honor, there's one other
3 expert we've had review Stroz Friedberg's report,
4 not in total, but have gone over it to try to find
5 some of the conclusions, that's Silent is the name
6 of the company that's already been involved in this
7 case. They have imaged some media a long time ago.
8 And then there's one other expert we haven't yet
9 disclosed. It's purely a consulting expert that
10 has evaluated it. So we will be disclosing them at
11 some point if we intend to use them.

12 But my point is, your Honor, that's just the
13 experts. There's more in this motion than just
14 experts. You just pointed out when did Facebook
15 start? Mr. Zuckerberg has never declared what
16 document he signed or didn't sign under oath. Is
17 it the StreetFax digital image that he signed, and
18 is he going to declare that he didn't sign the
19 contract that he has with my client? He has now
20 put that that issue --

1 don't need a deposition, do we?

2 MR. BOLAND: Yes, we do --

3 THE COURT: Why?

4 MR. BOLAND: -- because we have a right to
5 get all these things under oath, not only these
6 issues here --

7 THE COURT: Well, if it comes in a
8 declaration under oath, what's wrong -- that's a
9 simple fact, isn't it?

10 MR. BOLAND: That is, your Honor. But
11 there's wider facts than that. They have based
12 their motion to dismiss --

13 THE COURT: That's one thing, we don't
14 need to depose Zuckerberg on that issue.

15 MR. BOLAND: We don't, but there's no need
16 to get a declaration from him on it either, because
17 there's a ton of stuff that he has to be deposed
18 on. The emails to begin with. Where are all the
19 computers he used in 2003 and 2004? They've made
20 claims that these emails between him and my client
21 don't exist. Mr. Zuckerberg needs to declare what
22 computers he used during that time to interact with
23 the Harvard server. And we have to analyze the
24 Harvard server to determine if that's even true.

25 THE COURT: Excuse me, how could that

1 possibly bear on the competency of the expert
2 opinions which tend to suggest, which is I think an
3 understatement, that the Work for Hire document is
4 a fake?

5 MR. BOLAND: I'm -- I'm not talking about
6 the experts at this point.

7 THE COURT: Well, I am.

8 MR. BOLAND: I'm saying beyond just the
9 experts. Well, okay.

10 THE COURT: I want to know how knowing
11 about all of Zuckerberg's computers would in any
12 way implicate and undermine the expert opinions
13 that are elaborated in this document?

14 MR. BOLAND: Your Honor, because we're
15 entitled to challenge Stroz Friedberg's conclusions
16 which are completely subjective and in dispute
17 about how these anomalies as they call it arrive on
18 Paul Ceglia's parent's computer and in these
19 emails. And it is not without a good-faith basis
20 to the following facts which are known.

21 Mr. Zuckerberg was disciplined at Harvard for
22 gaining unauthorized access to Harvard computers.
23 That's known. Although the record's sealed, and
24 once we get into that record, we'll know precisely
25 what he admitted to doing.

1 THE COURT: What does that have to do with
2 the competency of Stroz Friedberg's analyses.

3 MR. BOLAND: Because their analyses fails
4 to look at could that computer have been
5 compromised. What about their own emails that they
6 produced --

7 THE COURT: Which computer?

8 MR. BOLAND: The computer on which that
9 evidence was found. There's no talk about, hey, we
10 confirmed that there was no -- no individual got
11 access to that computer in any unauthorized way
12 through viruses or through anything that would
13 indicate hacking. Not Mr. Zuckerberg, any person,
14 someone on his behalf, some -- whoever.

15 THE COURT: I'm talking about the emails
16 that are attached to the amended complaint which
17 tend to corroborate the theory of the plaintiff
18 that there's a contract relative to ownership of
19 Facebook, correct?

20 MR. BOLAND: Yes.

21 THE COURT: Okay. So, the question is, in
22 the absence of hard copy of the emails which your
23 client claims he received or -- and/or sent to
24 Zuckerberg which are attached to the amended
25 complaint, he somehow managed to recreate the text

1 on a floppy disk using a word processer, correct?

2 MR. BOLAND: I don't think so. I think he
3 copied them directly to that device is what
4 happened.

5 THE COURT: Right.

6 MR. BOLAND: From what I remember from his
7 declaration.

8 THE COURT: He copied them somehow, right,
9 to the floppy, right?

10 MR. BOLAND: Yes.

11 THE COURT: Stroz Friedberg has pointed
12 out numerous indications that suggest that those
13 emails are fabrications, have they not?

14 MR. BOLAND: I wouldn't say numerous.
15 There's three or four.

16 THE COURT: Yes.

17 MR. BOLAND: But they haven't explained
18 how the server --

19 THE COURT: How would knowing where
20 Mr. Zuckerberg's computers at Harvard are located
21 or how many there were of them in any way, shape,
22 or form allow you to refute the accuracy of Stroz
23 Friedberg's analysis?

24 MR. BOLAND: Because if these Harvard --
25 these emails end up on the Harvard server,

1 somewhere Stroz Friedberg hasn't looked, because
2 they took a biased analysis, that would disprove --

3 THE COURT: That's a different point than
4 the point you just made.

5 MR. BOLAND: -- the entirety of it.

6 THE COURT: You said you need to know
7 where all the computers are. Now you're accusing
8 Harvard of having an incompetently operated server.

9 MR. BOLAND: No.

10 THE COURT: Yes, you are.

11 MR. BOLAND: Let me be clear.

12 THE COURT: Yes, you are.

13 MR. BOLAND: Stroz Friedberg did not
14 look --

15 THE COURT: Yes, they did. They received
16 copies, according to Harvard, of all -- they did a
17 dump of all the information on Zuckerberg's account
18 in the Harvard servers, found nothing that
19 pertained to Facebook.

20 MR. BOLAND: And here's what they didn't
21 get, backup tapes of that server to compare to what
22 was available on that server when Harvard gave it
23 to them. There could be a difference there. In
24 addition, they didn't get any data --

25 THE COURT: Why is that not in your

1 papers? I mean, it seems, Mr. Boland, that you
2 kind of sort of like Tennyson's brook here, it just
3 kind of keeps on flowing, you know. I mean, are
4 you suggesting that the information that Stroz
5 Friedberg received from the Harvard people was
6 somehow manipulated?

7 MR. BOLAND: No, it was incomplete.

8 THE COURT: How do you know that?

9 MR. BOLAND: Because --

10 THE COURT: Did your experts tell you
11 that?

12 MR. BOLAND: Stroz Friedberg has told us
13 what they received, and it didn't include backup
14 tapes of those servers. It didn't include any
15 information about what devices Mr. Zuckerberg used
16 to connect to his email in 2003 and 2004, like a
17 laptop, where he could very easily, Stroz will tell
18 you, save emails to a laptop that are no longer on
19 the server. We don't know that. Harvard didn't
20 tell us that. Why? Because Stroz didn't ask for
21 that, because it doesn't help their client's case.

22 THE COURT: So you're looking for
23 Zuckerberg laptops in 2003.

24 MR. BOLAND: Well, we know where the
25 laptops are. We're looking to see if those laptops

1 connected to the Harvard server and then obviously
2 would have emails on them, copies of emails that
3 would be discoverable to compare.

4 THE COURT: Wouldn't necessarily
5 technically the emails have to be lodged on the
6 Harvard server if they were connected?

7 MR. BOLAND: No.

8 THE COURT: No?

9 MR. BOLAND: And your assistant --

10 THE COURT: Why would you be connected to
11 the server?

12 MR. BOLAND: You can connect with a laptop
13 to a server, and you can send emails from the
14 server. You can download them from your laptop and
15 then execute a command to delete them off the
16 server.

17 THE COURT: And the server never remembers
18 the emails?

19 MR. BOLAND: Servers turn over so fast,
20 they overwrite those parts of the hard drive. It
21 can be gone within days.

22 THE COURT: But the backup would pick it
23 up?

24 MR. BOLAND: There is a backup tape that
25 has to be looked at. It might pick it up.

1 THE COURT: So -- so Stroz Friedberg as to
2 this issue were not competent experts because they
3 did not request the backup tapes for that period of
4 time relative to Zuckerberg's account?

5 MR. BOLAND: I wouldn't use the word
6 competent. I would say they're biased. They
7 purposely didn't look where there could be
8 information that would hurt their client. Just
9 like they didn't examine the computers that Parmet
10 currently has in its possession. Why would they
11 bother to examine those, your Honor? Because it
12 could potentially have evidence discoverable in
13 this case.

14 THE COURT: Who was that again, Parmet?

15 MR. BOLAND: We talked about these earlier
16 in the case. These are several computers that
17 Mr. Zuckerberg has admitted using in 2003, 2004,
18 for both electronic communication, email and
19 texting.

20 THE COURT: The name rings a bell, but I
21 can't remember exactly what it was.

22 MR. BOLAND: Parmet is a computer forensic
23 firm that has possession of what are claimed to be
24 copies of Zuckerberg's computers from the time when
25 he started Facebook in his dorm room, including,

1 your Honor, what they claim is the laptop that was
2 used as the original server to run Facebook. And
3 guess what information that will have? When
4 Facebook weren't live, and who was a beta tester
5 and could see Facebook, and could college kids --
6 I'm sorry, could people outside of college get
7 access to that laptop? That laptop has that
8 evidence, and Stroz Friedberg ignored it. They did
9 this multi-page report.

10 THE COURT: How do you know there is such
11 a laptop?

12 MR. BOLAND: Because the defendants have
13 said already on the record that that -- in fact, we
14 had a conference about this on the day before
15 Thanksgiving. Mr. Snyder said I know all about
16 those computers. Mr. Zuckerberg used them when he
17 was a freshman at Harvard. And they were --

18 THE COURT: That included -- I don't
19 remember any reference to a laptop. I guess I
20 should have, but I didn't.

21 MR. BOLAND: Multiple laptops and loose
22 hard drives that are still preserved, so there's no
23 cost or burden to producing them for our expert to
24 evaluate. And those could have information. It's
25 a perfect example, your Honor. What if there's a

1 single email on one of those laptops which are
2 entirely discoverable under the Court's discretion
3 that say I got this guy in New York that gave me
4 \$2,000, but I'm going to tear up the contract, I'm
5 not paying him. Guess what? Everything in that --
6 that you see in that document right there just blew
7 up. One email.

8 And what they're not looking at with their
9 experts is what's there. And the question is, why
10 aren't they looking at it, and why doesn't
11 Mr. Zuckerberg come forward with his contract, or
12 explain where it is? And I think there's reasons
13 for that, and we're entitled with a good-faith
14 inference to say we need to discover that. It's
15 not going to hurt them. It's no burden on them at
16 all. It's already been produced.

17 And you're looking at what you say is an
18 avalanche, and it's persuasive, and I've just
19 demonstrated to you a single email could change
20 that from persuasive to a losing case for them,
21 which it is, because the contract is valid. And
22 they're using this digital mumbo-jumbo to try to
23 get rid of an actual paper document.

24 And there's absolutely no support for the
25 notion that you can take an original document --

1 and the rules regard what we have as an original --
2 and come up with some copy. Because the digital
3 image they're talking about is not an original, and
4 say that digital copy overcomes the original.
5 Sorry, your original loses. No. 1008, as the
6 Court asked us to brief, says otherwise. Well,
7 asked us to consider. Let me be clear.

8 THE COURT: Yeah.

9 MR. BOLAND: And we did brief. All the
10 case law in there says otherwise. They're
11 challenging the authenticity of this document.
12 1008 says judges back off and juries step in.

13 THE COURT: In other words, there's no
14 inherent power to dismiss based on fraud where the
15 underlying dispute is over the allegedly fraudulent
16 contract. There just no power. The Court is -- is
17 forbidden, if you will, or disempowered from acting
18 on a request to dismiss based on fraud where the
19 fraud inheres in the contract that is at dispute.
20 That's what you're thinking?

21 MR. BOLAND: Yes, your Honor. Because
22 admissibility, as you point out at the last
23 hearing, is weight.

24 THE COURT: That's my concern too when I
25 asked you to look at the issue. But you haven't

1 provided any authority that says so.

2 MR. BOLAND: In the brief that we provided
3 had every federal case which has dealt with
4 Rule 1008, and they all clearly say -- they don't
5 qualify it. They don't say, well, if you challenge
6 it with a lot of experts, now the judge can step
7 in. It doesn't say that. They want you to extend
8 it to that. They want you to extend it to 1008
9 means, if you challenge the authenticity but with a
10 really big stack of paper, now the judge can take
11 it out of the jury's hands. That's the case law --
12 that's the order they want you to write. That's
13 the law they want you to establish.

14 THE COURT: Well, I mean it is a clear and
15 convincing standard that we have to apply, correct?

16 MR. BOLAND: It is, and we are entitled,
17 in fairness, to rebut the clear and convincing
18 standard with as wide a discovery as necessary to
19 go at every issue they raised. That's why deposing
20 Mr. Zuckerberg is critical. He has to say under
21 oath answers to all this. Again, imagine he says
22 under oath, here's the date and time Facebook went
23 live. But his computers held by Parmet say no, no,
24 it went live two weeks earlier. That's a
25 credibility issue which we wouldn't want the Court

1 to rely on some news report as opposed to the
2 comparison of an individual who has admitted
3 committing forgeries and frauds himself,
4 Zuckerberg, with regard to this company and its
5 business records under oath. That's the person
6 we're talking about.

7 And so it is not defamatory for me to say I'm a
8 little concerned that Mr. Zuckerberg's statement
9 about when he started Facebook might not be
10 accurate perhaps from his memory or perhaps for
11 some other reason, but the computers will tell us
12 everything that was going on then. Does he have
13 emails there? Computers will tell us. When did
14 Facebook go live? The computers will tell us.

15 THE COURT: You're talking about the
16 computers in the other -- in the Boston lawsuit
17 that you didn't know about before.

18 MR. BOLAND: Yes, sir, because they're
19 arguing --

20 THE COURT: I understand.

21 MR. BOLAND: -- the emails that my client
22 sent in both '03 couldn't have been sent. Well,
23 we'll know for sure once we look there now we,
24 won't we? We'll have a better clue.

25 THE COURT: You'll want those downloaded

1 by your experts as they -- you want access to those
2 computers under the protocol that we have?

3 MR. BOLAND: Yes, your Honor. I think the
4 Court would agree that's fair. They had their
5 protocol. It worked very well. They didn't
6 disagree with it when it was entered into. And you
7 just have to flip the parties.

8 THE COURT: They preserved them. I think
9 there are four computers involved, is that what I
10 recall?

11 MR. BOLAND: The Parmet computers?

12 THE COURT: Right.

13 MR. BOLAND: I think it's four related to
14 Mr. Zuckerberg, but there's two or three others
15 related to other founders which also could have
16 discoverable information on them, communications
17 between them. But it's not just that, your Honor.
18 It's the depositions -- I'm sorry, the now sealed
19 information in the other two cases. There's
20 deposition testimony and guess what it's about?
21 When was Facebook founded, who founded it, who was
22 involved, who gave money. Those are all the
23 central issues to this case that are now hidden
24 behind a wall of a sealed record.

25 THE COURT: Why is that?

1 MR. BOLAND: Because the parties when they
2 settled the claims that Mr. Zuckerberg has settled
3 twice now, one that he defrauded an early stage
4 investor, sounds familiar. He settled that case,
5 and part of the settlement was to seal the record.
6 That's Eduardo Saverin's case. The second case,
7 the ConnectU case, was the now famous case that
8 became the movie, The Social Network, another claim
9 of breach of contract, unjust enrichment, some
10 fraud thrown in.

16 MR. BOLAND: Perfect. The emails that my
17 client says indicate the time that Mark Zuckerberg
18 was telling him that Facebook went live, those
19 witnesses are all testifying about when Facebook
20 went live, and the computers will say so. It will
21 bolster my client's email as opposed to contradict
22 their expert and their lawyers who argue otherwise.

23 THE COURT: You know who those people are?

24 MR. BOLAND: Which people?

25 THE COURT: Who know -- have personal

1 knowledge of when, in fact, it went live?

2 MR. BOLAND: I have none at all.

3 Discovery will bear that out, because the people
4 who were founders will be able to tell us. They'll
5 be able to say we know when it went live. We
6 testified in these now sealed cases.

7 And there's one other point about the computers
8 I want to make, your Honor. I was contacted in
9 late November out of the blue by a lawyer named
10 Tyler Mead from California who represented at that
11 time ConnectU, the Winklevoss twins, et cetera. He
12 was aggressively pursuing cracking open the
13 settlement that those twins had entered into, and
14 he said to me, I don't know want you sending me
15 emails. I don't want any record we talked. I want
16 you to go to the ConnectU docket and look at these
17 specific documents, because Facebook has computers
18 which I believe have evidence that will help you
19 and will help my clients, and they are I trying to
20 destroy them. We had our whole conversations about
21 that as the court knows.

22 Here's a tie-in. Mr. Snyder finally resolved
23 that issue by sending a letter to me and to the
24 Court saying, we'll preserve those computers, and
25 we know that they will be preserved, because the

1 defendants in that case -- I'm sorry, the
2 plaintiffs in that case have withdrawn all their
3 motions. They disappeared. And Mr. Tyler Mead
4 refused to return my phone calls following that
5 incident. They've just gone off.

6 THE COURT: I don't recall Mr. Snyder's
7 representation being that way. My recollection,
8 for whatever it's worth, subject to whatever the
9 record shows, is that he agreed that those
10 computers would be preserved, period.

11 MR. BOLAND: He did agree to that, but
12 also in his communication he stated that the
13 motions were being withdrawn by that lawyer, Tyler
14 Mead, and all of a sudden there's another issue
15 there. Why were those individuals withdrawing from
16 the case? What happened there? And again, it
17 shows you how fiercely Facebook is trying to
18 protect those computers from my client seeing them.

19 THE COURT: Are you suggesting that
20 something happened to Mr. Mead or something at the
21 hands of Facebook or something? I'm not sure what
22 your point is.

23 MR. BOLAND: No. I'm suggesting that they
24 are fiercely protecting those computers from my
25 client for a reason. I don't know what the reason

1 is, but there's a reason, and they went so far as
2 to resolve the Winklevoss case.

3 THE COURT: It doesn't sound like it
4 unless Mr. Snyder has been -- maybe that's your
5 point -- he's been finessed, bamboozled by his own
6 client. He's representing to the Court that
7 they've been preserved, and now we're going to go
8 back and look at them and they're not preserved, is
9 that what your point is?

10 MR. BOLAND: No, your Honor. I'm not
11 talking about preservation at all. I'm talking
12 about the lengths they've gone to that's all.

13 THE COURT: Well, if they have preserved
14 the computers, how can you say that they're
15 fiercely trying to prevent people from having
16 access to them?

17 MR. BOLAND: Two different things, your
18 Honor. They're not violating the Court's orders.
19 They're preserving them.

20 THE COURT: Yeah.

21 MR. BOLAND: But they --

22 THE COURT: Implying that they -- that
23 they're available --

24 MR. BOLAND: That case went away.

25 THE COURT: -- to be reviewed if

1 necessary.

2 MR. BOLAND: Yes. That case went away
3 because the Winklevoss twins wanted access to those
4 computers, and Facebook said we're not comfortable
5 with that, and somehow that case disappeared. And
6 now they're doing the same thing here by saying
7 there's no justification for us to access those
8 computers. And I just pointed out to you multiple
9 factual issues they raised that those computers
10 will answer.

11 THE COURT: I thought it all had to do
12 with -- I mean, I don't know anything about these
13 things because I've never read the book and I've
14 never seen the movie, and I don't intend to until
15 after this case is over, whenever that may be,
16 which means I may never see the movie or read the
17 book at the rate we're going. But I always thought
18 that that subject that you're referring to had to
19 do with who owned the software, and that that's
20 what was resolved in that litigation for better or
21 worse, and the ownership -- I mean, I'm talking
22 about from a copyright point of view of the
23 software, not a business contractual point of view
24 such as is raised in this case -- what does that
25 have to do with whether or not this Work for Hire

1 agreement giving Mr. Ceglia half ownership or
2 84 percent or whatever figure one wants to pick, is
3 authentic?

4 MR. BOLAND: What I'm talking about, your
5 Honor --

6 THE COURT: I'm losing you here.

7 MR. BOLAND: I understand. In those
8 pleadings which some of which were excerpted into
9 this record, it was clear that evidence from those
10 computers bears on the issue of electronic
11 communications between early parties involved in
12 the founding of Facebook which would include my
13 client, and that they weren't turned over to the
14 Winklevoss twins, and the Winklevoss twins sued yet
15 again saying they were defrauded into a settlement.
16 That's all my point is.

17 And when we brought that to the Court's
18 attention, the Winklevoss twins -- I have no
19 information why, but I think we can all speculate
20 what happened there -- immediately, after
21 vociferously going after Mark Zuckerberg for a year
22 and a half because they felt defrauded, just
23 disappeared. And then those computers are now not
24 going to be accessed by those individuals, because
25 their case is over.

1 And they're trying the same thing here to
2 prevent Mr. Ceglia from seeing them, and we have a
3 reason to believe that their basis for doing so is
4 that there's information on those computers that
5 are relevant to that stack of documents you have
6 there. And as I pointed out, a single email
7 message could burn that whole package down. And
8 that's the fairness -- or the unfairness of
9 limiting our discovery to just a few experts and
10 then ruling on the motion. We're entitled to
11 respond with all discoverable relevant evidence.

12 They've had nine months. They agreed to a year
13 of fact discovery before they filed all these
14 motions. They thought that was a suitable time.
15 Not saying the Court would agree, but the parties
16 agreed. They've had nine months. I think it's
17 reasonable that we get discovery on all these
18 issues, computers, the sealed cases, and all the
19 experts, and we can do that in six months, which is
20 less time than they have. I think that's
21 reasonable. I don't think there's anything
22 unreasonable that they can argue about that, except
23 to protect evidence that know is going to turn the
24 case around.

25 If you have know further questions, your Honor,

1 I'll be seated and answer anything else afterwards.

2 THE COURT: Thank you. Any rebuttal, Mr.
3 Snyder?

4 MR. SNYDER: I do, your Honor, but may we
5 just have a three-minute restroom break?

6 THE COURT: Oh, sure. Take a five-minute
7 comfort break.

8 (Short recess was taken.)

9 THE COURT: Plaintiff's counsel may have
10 flights that have to be caught. Unless they're
11 going to make a presentation, they're welcome to
12 depart at any time without hurting my feelings. If
13 they wish to be heard, step to the podium and let
14 me hear what you have to say. For example, I don't
15 know, does Mr. Duman want to rebut the assertion
16 of the plaintiff regarding accusing Mr. Zuckerberg
17 of illegal hacking?

18 MR. DUMAN: Your Honor, if you want to
19 hear what I said --

20 THE COURT: No, no, it's up to you.

21 MR. DUMAN: I'll simply say this, your
22 Honor. When your Honor looks at the transcript,
23 you'll see that what Mr. Snyder said that I said to
24 the Wall Street Journal bears very little
25 relationship to the quote he then read later. I

1 was asked by the Wall Street Journal about these
2 sort of issues, and in that specific topic I said,
3 "That's one of the things that will have to be
4 developed. I don't have an answer for you today."
5 And she said, "well, can you speculate?" And I
6 said, "Well, it has been speculated that
7 Mr. Zuckerberg had the ability to hack in, and it's
8 not hard to do." That's what the quote was.

9 THE COURT: Oh. So they -- they -- the
10 reporter for the Wall Street Journal sort of, you
11 know, gave it a little twist, if you will, and made
12 it sound like you were making that as an assertion
13 against Mr. Zuckerberg?

14 MR. DUMAIN: I think Mr. Snyder gave it
15 more of a twist than the reporter did.

16 THE COURT: I see. Okay. Reporter got it
17 right, and Snyder didn't. Reporters always get it
18 right, you know that.

19 MR. DUMAIN: I won't go so far --

20 THE COURT: Especially since there are a
21 few in the room.

22 MR. DUMAIN: I want go so far as to
23 suggest that Mr. Snyder is always wrong.

24 THE COURT: When I was corporation counsel
25 in the city of Buffalo way back when, there was a

1 reporter for the Buffalo News, Franklin Beule. He
2 was an expert on baseball by the way. And I had
3 just returned from Notre Dame Law School to be
4 corporation counsel under a leave of absence, and I
5 never knew the man. He was very -- a very charming
6 and soft-spoken gentleman, somewhat my senior. And
7 he would come into my office with his hands in his
8 pockets, and he would ask me questions, and I guess
9 they liked to talk me because I was probably one of
10 the few high-ranking city officials who liked to
11 talk -- not liked to talk, but was willing to
12 talked to media, so I guess I made a lot of good
13 copy backing in that era.

14 But anyway, he would come in and ask me a
15 series of questions on something fairly technical
16 that was pending before the common council or
17 whatever it was, some major issue. And I would
18 make some comments at some length explaining the
19 legalities of it, and he would walk out. Next day
20 in the newspaper he would write a column about it.
21 And I was astounded to read that what I had said to
22 him was quoted verbatim, including commas. It was
23 the most amazing thing I've ever seen. I was so
24 impressed.

25 MR. DUMAIN: Your Honor, the only comment

1 I make about speaking to reporters is that I
2 generally try not to do it. At the end of this,
3 the reporter thanked me for taking the time to
4 speak with her. And I said, "Well, frankly it's
5 because my daughter is a young journalist, so I'm
6 feeling more sympathetic to journalists trying to
7 get information." And but I think after this
8 exchange, your Honor, I'm probably going to stop
9 doing that.

10 THE COURT: Don't worry about it.

11 MR. DUMAIN: The other thing I was just
12 going to say, your Honor, one is -- nothing to do
13 with the merits -- but I just wanted your Honor to
14 know I was born in Utica, so I do have some upstate
15 blood in me.

16 THE COURT: Well, you're closer to Buffalo
17 than Mr. Snyder, so we'll give you a point for
18 that.

19 MR. DUMAIN: Thank you, your Honor.

20 THE COURT: And that's close to Rome where
21 my senior law clerk is from originally.

22 MR. DUMAIN: And I have relatives in Rome,
23 your Honor. But the point I wanted to make of
24 substance, your Honor, is simply is this. We spent
25 much of the afternoon talking about the expert

1 reports that defendants submitted. And I
2 appreciate that there's a lot there, and I
3 appreciate that there's a lot the plaintiff needs
4 to rebut in order to overcome the motion to
5 dismiss. But this is the motion to stay, not the
6 motion to dismiss. And I think it's only fair,
7 your Honor, that the plaintiff had the ability to
8 prevail on that motion with whatever facts are
9 reasonably out there, not just rebut the experts,
10 although obviously we'll make every attempt to do
11 that persuasively. But if there are facts out
12 there in addition to that that support the
13 plaintiff's claim, we're entitled to that on a
14 motion where the defendants are trying to get rid
15 of this case in totality.

16 What we can get in discovery here is not
17 burdensome to them. Deposing the experts is not
18 burdensome to them. Getting those computers that
19 Mr. Boland talked about is no burden to them, and
20 getting the discovery that they've already produced
21 that's in the can in other litigation is no burden
22 to them, and that's what I would submit would be
23 reasonable.

24 THE COURT: Well, I don't know that they
25 have access to all of that Boston litigation.

1 MR. DUMAIN: Oh, I think they do. I think
2 they do. They were a party to it. Talking about
3 case -- I'm talking about cases where Zuckerberg --

4 THE COURT: Oh, I see, Mr. Zuckerberg is a
5 party to it. Yeah.

6 MR. DUMAIN: And with that, I appreciate
7 your offer to allow me to leave early, but I will
8 stay.

9 THE COURT: Stay with us for a while.

10 MR. DUMAIN: I will stay. Thank you, your
11 Honor.

12 THE COURT: All right. Mr. Snyder.

13 MR. SNYDER: Thank you, your Honor. Your
14 Honor asked a question of Mr. Boland why isn't this
15 in the papers, and the answer is clear. Because
16 had what much of what he said been put in the
17 papers, it would have had to be signed pursuant to
18 Rule 11, and they did not want to do that. And
19 that's because I counted at least four -- so I'll
20 highlight those and then address some other
21 points -- egregious and disturbing
22 misrepresentations made by Mr. Boland about
23 evidence and other material facts,
24 misrepresentations that are so glaring that I would
25 respectfully submit to your Honor that this Court

1 cannot and should not trust or credit anything he
2 says in this court that isn't certified.

3 Let me catalog them. They're very clear and
4 explicable. First, he said that with pitched voice
5 repeatedly that the ink testing is junk science. I
6 don't have the quotes written down. I stopped
7 writing them down. But he basically said, your
8 Honor, repeatedly no one has endorsed that, that
9 that's nonsense and we will show that.

10 THE COURT: The evaporation technique.

11 MR. SNYDER: The PE testing.

12 THE COURT: Yes.

13 MR. SNYDER: That is false, and it must be
14 knowingly false. The reason why is first -- let me
15 just give you some background of the test and then
16 I'll give you the punch line. So, first of all, he
17 said every court that has considered it, it's never
18 survived a Daubert challenge. False. Provide a
19 citation. There are none.

20 Second, background fact, government forensic
21 laboratories around the world PE testing to date
22 ink. But here it is, PE testing has been
23 scientifically examined and validated in numerous
24 studies cited by LaPorte. At least five of them,
25 your Honor, were authored in full or in part by

1 who? Plaintiff's own expert, Valery Aginsky. So,
2 if you go to Mr. LaPorte's -- so, if you go to
3 Mr. LaPorte's affidavit provided to the Court on
4 page 7 he cites, Aginsky, Current Methods for
5 Dating Documents, Which is Best? 1997, Aginsky,
6 Measuring Ink, Extractability is a Function of Age,
7 et cetera, et cetera.

8 But there's more. Mr. LaPorte published an
9 article on PE ink dating when he was at the Secret
10 Service that was coauthored by four other authors
11 at the Secret Service. Now, articles published by
12 members of the Secret Service must go through an
13 elaborate vetting process, reviewed by branch
14 chiefs, lab directors, and then the public affairs
15 department. All of those department heads approved
16 Mr. LaPorte's article on PE testing, including the
17 lab director at the time, who? Plaintiff's expert,
18 Larry Stewart. So Mr. Boland told, your Honor,
19 that this was junk science that no one had ever
20 whatever --

21 THE COURT: Accepted it.

22 MR. SNYDER: Except his two experts.
23 That's point one. Point two is he told your Honor
24 falsely that when he had no answer for the
25 StreetFax contract, no answer to explain the

1 StreetFax contract and how it was sent in an email
2 signed Paul from the Seagate drive with his phone
3 number to Sidley Austin. And your Honor asked him
4 about the privilege log, and he said falsely to
5 your Honor oh, well, that was just -- I don't know,
6 maybe Lake. And then he said it was said -- it was
7 just said to his lawyer. That's false. That's
8 wrong.

9 Document 241-2 filed in this case on
10 October 28th, 2011, lists as the first item in the
11 privilege log, March 3, 2004, email from Paul
12 Ceglia -- from Paul Ceglia to his attorney, Jim
13 Kole, Esquire. And those -- page 1 of signed and
14 dated StreetFax contract, attorney-client
15 privileged. That is a judicial admission that is
16 binding as a matter of law and ends the case
17 without the need to subject Facebook and
18 Mr. Zuckerberg to more expense and burden of any
19 discovery. I'll submit to your Honor case law
20 after this hearing that when -- when -- when a
21 party submits a pleading that represents facts to a
22 court, that's binding.

23 THE COURT: I know that, Mr. Snyder.

24 MR. SNYDER: And Mr. Boland knowingly
25 mischaracterized this document. There's a third

1 one that is equally egregious.

2 THE COURT: Is this the third
3 misrepresentation?

4 MR. SNYDER: Yes.

5 THE COURT: I just want to -- while you're
6 looking for it --

7 MR. SNYDER: Yes.

8 THE COURT: -- I just want to note however
9 what I think he said was that the -- I'm not sure
10 what he really meant by it, but the implication was
11 that, I guess, the admission is not an admission
12 because he said it came from the parent's computer.

13 MR. SNYDER: No, but that was a different
14 point, which was absurd.

15 THE COURT: Oh.

16 MR. SNYDER: The point is that he was
17 saying it didn't even say from Paul Ceglia to Jim
18 Kole. It just said to his attorney, as if somehow
19 in excess of an abundance of caution they just
20 designated in a blanket way all emails that they
21 thought might be to an attorney. No. The lead --
22 the number one document they sought to shield is
23 the StreetFax contract page one, and they describe
24 in perfect detail its province.

25 Mr. Boland said, again, falsely, wrongly,

1 nobody knows its province. Guess who knows its
2 province? His client knows its province, because
3 in a judicial admission he told your Honor its
4 province. It's an email from Paul Ceglia. There's
5 no further inquiry necessary. And there's no way
6 to get around that unless he's going to accuse
7 Mr. Lake of misrepresenting him again when -- like
8 he did when Lake said that he instructed him not to
9 file --

10 THE COURT: I'm trying to recall
11 specifically. The attachment, the StreetFax was
12 signed what was sent to Kole?

13 MR. SNYDER: Yes, your Honor.

14 THE COURT: Signatures were on there?

15 MR. SNYDER: Yes, your Honor.

16 THE COURT: All right. And Mr. Zuckerberg
17 has under oath acknowledged that that was the
18 contract?

19 MR. SNYDER: What mr. Zuckerberg submitted
20 on June 1, 2001, it's the third he
21 misrepresentation that Mr. Boland made.

22 THE COURT: Oh, okay.

23 MR. SNYDER: He said repeatedly,
24 amazingly, I would say disturbingly, that Mark
25 Zuckerberg didn't deny signing the Work for Hire

1 contract. He said that repeatedly. Paragraph 5 of
2 Mr. Zuckerberg's declaration, which is document 46,
3 "I did not sign the document attached as Exhibit A
4 to the amended complaint."

5 Now Mr. Boland told your Honor that he was not
6 clear and more clarity was required. How can one
7 be more clear than that? And in case there was any
8 doubt, in paragraph 8 he asserts "The document
9 attached as Exhibit A to the amended complaint is
10 not the written contract I signed. The written
11 contract I signed concerned only the development of
12 StreetFax's website, period. It did not mention or
13 concern the Facebook.com or any related social
14 networking service or website."

15 Paragraph 10, "I did not enter into any
16 agreement, written or otherwise, with StreetFax,
17 Ceglia, or anyone affiliated with Ceglia concerning
18 Facebook or any related social networking site."
19 He swore to that and submitted it to your Honor
20 before Stroz Friedberg found the Work for Hire
21 document, StreetFax document on the concealed
22 Seagate hard drive. So he identifies perfectly
23 in 2011 the StreetFax contract of which he did not
24 keep a copy, which Mr. Ceglia did keep a copy.

25 The next egregious misrepresentation --

1 THE COURT: But the point is that he --
2 did he also go on to say at some point that the
3 StreetFax contract is the correct contract?

4 MR. SNYDER: He hasn't, but certainly that
5 would be easy to do.

6 THE COURT: But he's willing to, you're
7 sure?

8 MR. SNYDER: Oh, for sure. The next
9 egregious misrepresentation, which, again, it's
10 almost -- it's almost bizarre that he would -- that
11 Mr. Boland would do this, because it's so contrary
12 to the evidence. He said there's no evidence -- in
13 referring to the USB devices that his client
14 spoliated during this case, he said, quote,
15 "There's no evidence as anything relevant to this
16 case." That's what he told your Honor.

17 Now, it's a matter of objective science that
18 attached to those USB devices or stored on those
19 USB devices were documents entitled Zuckerberg.tif.
20 The tiff file is the form of the StreetFax contract
21 found on the Seagate hard drive. I challenge these
22 attorneys to identify a document more relevant and
23 central to this case than page 1 and page 2 of the
24 StreetFax contract in tiff form.

25 Mr. Boland told your Honor casually and falsely

1 that there's no evidence that's anything relevant
2 to this case. It renders everything he says not
3 certified pursuant to Rule 11, I would say,
4 superfluous. And your Honor points out that
5 they've had years to authenticate the Work for Hire
6 document. They've had years to -- they've had
7 since August to dispute the StreetFax contract.
8 They knew it was coming. DLA Piper we have reason
9 to believe was aware of the StreetFax contract
10 before they even filed the amended complaint and
11 their experts were too. So they all knew or should
12 have known that this was coming, and did nothing at
13 all to come up with an explanation for it other
14 than this newfangled one that Mr. Dumain says he
15 was now speculating about, and that Mr. Boland was
16 tongue-tied when he tried to articulate, all of
17 which is noise and irrelevance what these attorneys
18 say, because their clients said in a judicial
19 admission that page one of the signed and dated
20 StreetFax contract -- that's their words in there
21 privilege log -- page 1 of signed and dated
22 StreetFax contract between Mark Zuckerberg and Paul
23 Ceglia is attached to a March 3, 2004, email from
24 Paul Ceglia to his attorney, Jim Kole. It's
25 irrelevant what they say.

1 Their client has told, your Honor, the province
2 of that document. That ends the case without any
3 need for the abusive discovery into prior
4 litigations, and computers, and laptops, all of
5 which is based on Mr. Boland's rank speculation,
6 what if we find an email? Well, on that theory, he
7 should be able to depose everyone. What if I
8 depose Mark Zuckerberg's cousin or brother or
9 sister? Maybe they'll come up with some admission.

10 A plaintiff before this Court destroying
11 evidence, spoliating evidence, with a mountain of
12 evidence that this is a fraudulent lawsuit does not
13 have the right to conduct that kind of discovery
14 when it is not central to the question before this
15 case, is the StreetFax contract authentic and real,
16 and is the Work for Hire document a fake?

17 Now, they seem to have though all sorts of
18 experts who are prepared to opine on this issue.
19 So what I would respectfully submit is the
20 appropriate procedure is that the plaintiff be
21 given an opportunity, whatever is a reasonable
22 amount of time, to submit all of their expert
23 affidavits, and -- in opposition. If the Court has
24 questions or wants further information, the Court
25 can direct the parties to address specific targeted

1 questions. The Court knows the record extremely
2 well. That is the efficient process.

3 THE COURT: I'm trying to.

4 MR. SNYDER: That is the fair process
5 under these circumstances. It will avoid months of
6 discovery -- six months will turn into a year and a
7 half -- untold expense, millions of dollars of
8 additional costs, delay, discovery litigation. If
9 we were here five times on his non-compliance, you
10 can imagine how many times we'll be before this
11 Court on discovery fights based on their
12 speculation, and when he referenced -- I couldn't
13 believe that Mr. Boland brought up that
14 Thanksgiving eve abusive motion, because it just is
15 emblematic of the litigation approach here, which
16 is to drive up cost, drive up expense, mention the
17 Winklevoss twins as many times as they can, as if
18 that has anything to do with this criminal fraud on
19 the court.

20 And so what is what is fair in these
21 circumstances is the procedure I outlined.

22 Two more points. It's not irrelevant that this
23 is not the first time that Mr. Ceglia has been
24 before a court accused of crimes. It's not
25 irrelevant --

1 THE COURT: Wait. Wait. Wait. Wait a
2 minute. He's not accused in this Court of
3 anything.

4 MR. SNYDER: We are accusing him of
5 committing a criminal act. It's not the first time
6 that this plaintiff has been -- defrauded people.
7 He's been arrested for defrauding people. He has
8 forged government documents to steal money from
9 senior citizens in land scams. He's addressed none
10 of that to date. We set that out in June that this
11 is a serial felon who has been scamming and ripping
12 off people for years. And he's been scamming this
13 Court and scamming us from day one. And to now
14 give him license to conduct wide-ranging discovery,
15 when on the good cause showing your Honor didn't
16 think it was appropriate, would be not only
17 rewarding him for his misconduct, but delivering
18 him exactly what he hoped he could get from the
19 judicial machinery when he concocted this document
20 and filed this lawsuit, which is the final point.

21 Mr. Boland said something that was fascinating.
22 He said the original trumps the digital. The
23 original trumps the digital. All the case law says
24 that. Judges back off, juries step in. It's a --
25 it's a gimmick. It's a -- maybe even a little bit

1 of a limerick. But the original doesn't trump the
2 digital when the objective evidence and science
3 shows that the original is fake, and the plaintiff
4 has admitted in a document submitted to your Honor
5 that he sent the digital.

6 1008 is irrelevant in the context of the
7 exercise of inherent power. He says we can't take
8 it out of a jury's hands. That's precisely what
9 the Supreme Court and the Second Circuit instructs
10 trial courts to do where there's clear and
11 convincing evidence of fraud. Not rewarding the
12 recidivist felon by permitting him to depose Mark
13 Zuckerberg and rummage through computers that have
14 nothing do with the central issues before this
15 Court. And I have every confidence in the world
16 that your Honor, after reading our papers and the
17 opposition papers, if your Honor thinks any
18 additional information is necessary, that your
19 Honor will let us know, and we can address it in an
20 efficient, fair way as opposed to turning the
21 plaintiff's loose on Facebook and Mr. Zuckerberg,
22 which would be giving them exactly what in their
23 litigation overview plan they hoped for when they
24 concocted this lawsuit. Thank you.

25 THE COURT: So is there something that you

1 need to say in response to that, Mr. Boland?

2 MR. BOLAND: Yes, your Honor, briefly.

3 Mr. Snyder has a habit and I'm not going to go into
4 the details of misstating what I said, and then
5 arguing against it. It's kind of a debate
6 technique that's really not effective if you've
7 ever had kind of public speaking training. So I'm
8 not going to go into it.

9 He made several misstatements and argued
10 against them --

11 THE COURT: I think its called a straw
12 man.

13 MR. BOLAND: Yes. Well, we'll use that
14 term. And so I'm not going to address them. I
15 think the Court knows exactly what I said, and that
16 he makes up stuff and then argues against himself,
17 and he wins the argument -- or I don't know if he
18 wins. Perhaps he'll win on his ride home or
19 something.

20 Our expert, Mr. Stewart, is not going to
21 endorse the PE test. That's a false statement.
22 There's no report out there including what he
23 referenced where Larry Stewart's going to say, you
24 know, this test is really reliable. In fact the
25 opposite. He will eventually communicate to this

1 Court after our reasonable six-month period of
2 discovery that he was the supervisor for their
3 expert, Gerald LaPorte, and issued memos at the
4 Secret Service telling him you may not use this
5 test in any case work in our agency, because it is
6 not reliable. You can continue to test it. You
7 can continue to go in a back room somewhere and run
8 samples and try to figure out why it's junk. But
9 you will not use it in case work. And there is not
10 a government agency in the United States which
11 relies on that test. He knows better.

12 You know what he's talking about
13 internationally known, Canada. Two people in
14 Canada that were trained by Mr. Aginsky.
15 Mr. Aginsky is an expert who took a photograph of
16 this contract, offered some information about
17 nondestructive testing of the ink. He was not
18 hired, will never be hired in this case to talk
19 with PE testing. We have determined, ourselves and
20 the other experts, that that test, as he pointed
21 out, which was kind of a strange comment, show me
22 the case where the PE test has failed to pass a
23 Daubert test. Well, if it's failed to pass a
24 Daubert test, it wouldn't get into any trial
25 anywhere. But we will have cases where --

1 THE COURT: Usually -- well not usually,
2 but oftentimes courts do write written opinions
3 when you have Daubert exclusion motions.

4 MR. BOLAND: They do, but there's
5 challenges to Daubert where Mr. LaPorte -- the
6 lawyers have Mr. LaPorte slink away and withdraw.
7 As soon as the pleadings come in, he bails out.
8 Because -- and there's cases -- federal cases we
9 will point out to you, and even criminal cases
10 which is a travesty where he has attempted to take
11 someone's liberty based on his testimony on science
12 he knows is garbage. And that's happened in the
13 past with federal agencies and others who have come
14 in and talked about striations on bullets or other
15 types of science, which years down the road has
16 proven either to be bad science or the expert
17 themselves has fabricated data, and then all kinds
18 of trials have to start all over again.

19 This is not a shocking thing for a man who
20 currently works for the government and then
21 moonlights on the side in these kinds of cases to
22 have been engaged in using a test that his own
23 government agency he works for doesn't allow him to
24 use. But when he moonlights at 4 or 500 bucks an
25 hour, getting his checks from Facebook, he's more

1 than happy to use that ridiculous junk science and
2 try to persuade you in paperwork that that's a
3 basis for determining that that ink is less than
4 two years old.

5 Your Honor, we're asking for something that's
6 eminently reasonable, and it appeals to this
7 Court's sense that it expressed in December of
8 fairness. And in these cases with substantial
9 claims like this, the Court I think hit it on the
10 head when you said this -- the issue of fairness is
11 heightened. And to dismiss a case and claims of
12 this type by merely allowing us to submit some
13 paperwork to attempt to respond to nine months of
14 work that they've put in with a ton of conclusions
15 that we would not have anticipated, I think goes
16 against what the Court indicated its inclination
17 was, which was to be fair to Mr. Ceglia. This is
18 reasonable discovery.

19 It's -- if the defendants are concerned about
20 whatever information's going to be found on those
21 computers that it thinks are not relevant, the ESI
22 protocol that was used, that they used and agreed
23 to and that we would adhere to would resolve that.
24 They can strike for privilege everything they want.
25 Nothing gets released. And if they have concerns

1 about information being other than for attorney's
2 eyes only, they can make a motion, and they can
3 have that information control.

4 But this is a claim that merits minimal three
5 months less than the discovery they received so
6 that we can properly rebut, not just the experts,
7 but the factual claims, the claims about when or if
8 my client electronically communicated with their
9 client. It is -- it would -- it's an outrageous
10 statement for them to make that computers that
11 Mr. Zuckerberg used to communicate by email, et
12 cetera, with people in '03 are an improper place
13 for us to look to see if my client's emails, which
14 he pulled off his Harvard server, if he did, are
15 sitting there. That's not outrageous. This is a
16 good-faith discovery request.

17 THE COURT: Yes. But we do come -- before
18 you leave the podium, we do come back to the
19 StreetFax contract issue, don't we?

20 MR. BOLAND: In what regard?

21 THE COURT: Well, I mean it was fairly
22 well established based on the privilege log filing
23 from your client that the StreetFax contract was a
24 document that he acknowledged as a contract between
25 himself and Zuckerberg.

1 MR. BOLAND: Well --

2 THE COURT: I mean, we just heard from
3 Mr. Snyder about the privilege log.

4 MR. BOLAND: The privilege log related to
5 an email communication between himself and
6 Mr. Kole. I think, your Honor --

7 THE COURT: And it references the
8 StreetFax contract, doesn't it?

9 MR. BOLAND: It references the StreetFax
10 contract, but the privilege designation does not --
11 they show no case law which indicates that a
12 privilege designation means that the lawyer is
13 saying and the client is saying everything in that
14 document is totally authentic, no one altered my
15 email, no one altered the attachment. It's all
16 exactly as I sent it. That's not what a privilege
17 designation says.

18 THE COURT: It's not an admission that
19 it's a contract between Zuckerberg and your client?

20 MR. BOLAND: Not at all. Especially
21 because the attachment's not readable. So to
22 impute to my client knowledge that he actually
23 reviewed that attachment and said oh, yeah, that's
24 definitely something I sent to Jim Kole, it's not
25 readable. When you bring that document up on a

1 screen, can't read it. When you print it, it
2 prints eight and a half by 11, it's unreadable.
3 Now they transposed it somehow and put in a
4 certification about that, but that doesn't change
5 the fact that the document's unreadable.

6 And moreover, you know from your practice of
7 law, and these lawyers know as well, the way these
8 privilege designations can be done is individuals
9 saying, look, that's a letter between my client and
10 so and so, that's privilege. Let's move on to the
11 next one. I'm not representing how it was done,
12 but I'm telling your Honor that that designation of
13 a document that later turns out to be something
14 that wasn't authored by my client doesn't convert
15 it into something authored by my client. It just
16 doesn't.

17 THE COURT: He made a mistake is what
18 you're saying.

19 MR. BOLAND: There could be a wide variety
20 of reasons. He made a mistake, or he read it and
21 said what are all these extra words, or what is
22 this attachment? I never sent attachment like this
23 to Jim Kole. These are emails from '04 they're
24 claiming, that's at that time eight years earlier.
25 So if someone presented you an email from eight

1 years ago between you and a client and said is this
2 privileged? Your reaction would be, of course,
3 it's privileged, it's me and my client, and then
4 later you discover oh, wait a minute, I know I sent
5 a bunch of emails between my client, but, you know,
6 what, that's not one of them. I thought it was,
7 but it's eight years old.

8 THE COURT: I forgot to ask you, which
9 expert is it that did the analysis which showed
10 that the baked so-called first page, if not the
11 second page of the so-called Work for Hire contract
12 was exposed to ultraviolet light? Which expert was
13 that.

14 MR. SOUTHWELL: Mr. Tytell.

15 THE COURT: Tytell.

16 MR. SOUTHWELL: And Mr. LaPorte, both.

17 THE COURT: I forgot to ask you, I guess
18 I'm assuming I know what the answer is now, that
19 your experts will explain that it's, you know, junk
20 science.

21 MR. BOLAND: No.

22 THE COURT: That the -- that the document
23 was taken out of the safe deposit box -- at one
24 point when it was submitted to Mr. Aginsky for
25 analysis it, it had an appearance. And then later,

1 six months later, it had a different appearance,
2 and according to their experts, Tytell and --

3 MR. SOUTHWELL: Mr. LaPorte.

4 THE COURT: LaPorte, Mr. LaPorte, it
5 showed through scientific analysis that it had been
6 subjected to intense ultraviolet light --

7 MR. SNYDER: Or sunlight, right.

8 THE COURT: In order to create certain
9 characteristics and help to dry out the ink that
10 was on the document, particularly the ballpoint
11 interlineations and the signatures. The pictures
12 are worth a thousand words. I mean, they do tend
13 to show, don't they, that the document had peculiar
14 spacings in it as if it was being clasped in order
15 to be exposed to sunlight?

16 MR. BOLAND: Yes, your Honor. I can
17 address that in two ways.

18 THE COURT: That's not evidence of
19 spoliation by your client?

20 MR. BOLAND: Not at all, and I'll explain
21 why. We went over this issue in December, and the
22 Court had me do a demonstration for Mr. Snyder's
23 benefit of why, for the ink fading issue, comparing
24 one scan where the ink appears intense and vibrant,
25 and another scan taken later by a different person

1 with an unknown machine and unknown settings where
2 the ink appears faded was the repeated apples to
3 bowling pins thing that we talked about. And the
4 Court asked Mr. Snyder, "Do you understand what
5 Mr. Boland's arguing about why you can't compare
6 those?" And he said, "I don't understand it." We
7 took a break, and I visually demonstrated it on the
8 record with exhibits and pointed out to the Court,
9 and then you said to him, do you understand. It
10 now?

11 So we dealt with the ink fading issue. They're
12 comparing two disparate scans and trying to say
13 because they're different, therefore something was
14 done to the document. Now that's on the fading.

15 On the yellowing, our experts don't have
16 anything they need to say to prove who yellowed the
17 document. Here's why. I showed you at the
18 December hearing, it's on the record, their own
19 expert Tytell's scan the day they got the document
20 to evaluate, their own expert Lesnevich's scan 24
21 hours later, and I put them side-by-side. These
22 came from their pleadings, not mine. And you said
23 to Mr. Snyder "It appears from that demonstration
24 Mr. Boland's just done that the document was
25 discolored while it was in your expert's

1 possession." And Mr. Snyder said, "We reject that,
2 your Honor."

3 But a picture is worth a thousand words. I
4 don't have the exact exhibit that I used, but it's
5 on the record of that transcript, and the Court
6 agreed -- it wasn't difficult to agree, because you
7 can see a light-colored document and a yellow one,
8 and it's their two experts. In the first 24 hours
9 that they had that document, they subjected it to
10 excessive UV light.

11 THE COURT: Not according to the latest
12 report. They actually put a timer on it, and the
13 amount of time that it was exposed to the UV
14 analysis was a matter of seconds.

15 MR. BOLAND: That's their claim. But it's
16 not --

17 THE COURT: Well --

18 MR. BOLAND: Fine, your Honor, let's say
19 that that's their claim. It's undeniable from
20 their exhibits that document got yellow within 24
21 hours of them getting it. And moreover, in
22 addition to getting yellow during that time, their
23 expert's using that VSC machine. Guess what the
24 VSC machine has in it to make sure the paper
25 doesn't move while you're putting it under that

1 intense light? It has clips.

2 THE COURT: That match the clips in the
3 image?

4 MR. BOLAND: I don't think they're going
5 to match the clips, and here's why. They put the
6 document in and out so many times that it was
7 slightly jogged to the left or to the right, and
8 they kept exposing it in different areas to that
9 intense UV light. They did this over four days.

10 Our experts already gave declarations to this
11 Court saying they have never before seen such an
12 excessive use of that machine. So, by doing that,
13 they have not only yellowed the document, they've
14 then created those little marks, but moreover,
15 where are we now about challenging this ink fading
16 issue?

17 Here's a fairness problem for the Judge to
18 consider. We can't go back because they yellowed
19 it in their possession. How do we go back now and
20 say no, the ink wasn't that faded when you got it,
21 because you burned the thing up with UV light, and
22 you ruin our opportunity to challenge it. Now
23 isn't that convenient that they make an allegation
24 with expert reports that in a sense they've tied
25 our hands behind our back and say you can't

1 challenge it, but we should be entitled to a
2 dismissal on that basis, even though we've ruined
3 the document for you to rebut us.

4 And that's something else that we'll bring up
5 in our response after our reasonable period of
6 discovery is that there's a fairness issue with us
7 being able to rebut certain things they argue
8 because they damaged the key evidence in the case.

9 If you have no further questions, your Honor,
10 that's all I had to say.

11 THE COURT: Thank you. Well, I think
12 we're going to -- did you want to respond to that,
13 Mr. Snyder, briefly? Anything?

14 MR. SNYDER: I have nothing further to
15 say, your Honor.

16 THE COURT: Okay. We're going to grant
17 the motion in part and deny it in part. We're
18 going to stay general discovery, but permit a
19 limited period of expert discovery for the
20 plaintiff and the defendants.

21 I'll give the plaintiffs 60 days to depose
22 defendants' experts to prepare an opposition to the
23 motion to dismiss. And then how much time after
24 that would you need to file your written response,
25 including your reports?

1 MR. BOLAND: Your Honor, 60 days.

2 THE COURT: Sixty days?

3 MR. BOLAND: Yes.

4 MR. SNYDER: My question is, your Honor --
5 and we put this in our papers. We welcome expert
6 depositions. Certainly we think more in the record
7 the better in terms of our expert reports. So,
8 what we said in our papers is that if your Honor
9 was inclined to give expert discovery, that we
10 think it's appropriate for them to give us their
11 expert reports presumably before those depositions
12 so that we have -- that's the normal procedure that
13 you exchange expert reports before depositions so
14 that our experts have an opportunity to read and be
15 prepared to respond to. Otherwise, they're going
16 to be asked 400 questions at a deposition about
17 technical tests and other things that our experts
18 won't have a chance to study or respond to.

19 So if the goal here is to provide your Honor
20 with the best information, as opposed to some
21 ambush, then the best procedure we believe is that
22 they give us their expert reports responding to our
23 expert reports, they depose our experts, we can
24 depose their experts. Certainly we should have the
25 opportunity to depose their experts. And then they

1 can put in their opposition papers, and we'll put
2 in our reply papers that utilize that material.

3 If our experts are deposed by Mr. Boland with a
4 deposition outline that is their expert report, but
5 they're not giving us the expert report, it's just
6 unfair. And that's so expert discovery obviously
7 generally proceeds in that -- in that fashion. So,
8 if they want a period of days to submit their
9 expert report and then --

10 THE COURT: I think part of the difficulty
11 is in this instance they need -- the experts need
12 to have the defendants' experts deposed in order to
13 do a thorough job of filing or preparing a report.

14 MR. SNYDER: But under rule -- under the
15 expert rules, I mean, civil procedure it's
16 anomalous for one side to put in their expert
17 reports, and then be deposed.

18 THE COURT: Well, I know that. But this
19 is a little different.

20 MR. SNYDER: I don't think it is
21 different. I think he's characterized it that way
22 to gain an unfair tactical advantage, so that he
23 doesn't have to show his hand before he takes our
24 expert depositions. This is the normal case where
25 we've given our experts. I mean, usually we

1 have -- one side is given the expert reports, the
2 other side gives their expert reports. Sometimes
3 they're simultaneous exchanges. And then
4 depositions proceed. I've never heard of expert
5 discovery proceed in the fashion where one party
6 gets one side's expert reports and takes
7 depositions, and then has the opportunity to put in
8 their own reports, unless we then after they submit
9 their reports, you know, can have supplemental
10 reports. But we're just going to be in an
11 inefficient mode there.

12 So I think they should have 30 days, let's say,
13 or whatever they want, to give us their expert
14 reports. Then we depose their experts. They
15 depose their experts, and we can provide the Court
16 with whatever information in connection with the
17 motion to dismiss is -- is appropriate.

18 I don't see this as any different than the
19 normal case, only Mr. Boland says we don't know
20 what they're talking about. Well, the expert
21 reports are very clear in terms of methodology,
22 tests utilized, conclusions drawn.

23 THE COURT: I think that's his point, that
24 he wants to depose your experts on exactly all of
25 the issues -- not issues, but analyses that are put

1 forth in the reports. So there's no -- what
2 surprise is there in that?

3 MR. SNYDER: The reason the Federal Rules
4 provide for either simultaneous exchange of reports
5 or the sequential series of reports before
6 depositions is precisely to avoid the kind of
7 deposition ambush that the advisory committee notes
8 to the expert rules talk about. So it would be
9 unfair for us -- for our experts to be deposed with
10 them keeping their expert reports in their back
11 pocket. We should see their expert reports.

12 THE COURT: I think that's the point,
13 they're not going to have a report until they
14 depose your client.

15 MR. BOLAND: Yes, and they already agreed
16 to give us the reports in expedited discovery.
17 That was their agreement to give them to us.

18 THE COURT: That's why --

19 MR. SNYDER: But then we're going to have
20 the anomaly where their expert reports --

21 THE COURT: I know.

22 MR. SNYDER: -- talk about our
23 depositions. It really makes no good sense and
24 would be unfair. They've already been talking to
25 their experts. Their experts have an opportunity

1 to comment on our report so that our expert is
2 aware of and can prepare to rebut their expert's
3 challenge.

4 THE COURT: Let's say they file a
5 report -- just take the scenario -- in response to
6 your motion.

7 MR. SNYDER: Yes.

8 THE COURT: And this is all preparatory to
9 filing a formal document rebutting the motion --

10 MR. SNYDER: Yes.

11 THE COURT: -- to dismiss. I haven't even
12 addressed the statute limitations laches issue,
13 which I almost hesitate to go there, because I
14 think I know what Mr. Boland is going to say. He
15 says we need plenary discovery on that in order to
16 establish accrual dates and so forth. I'm hesitant
17 to even launch that one, but we may have to.

18 But he's saying that in order for him to
19 prepare a response to this motion, his expert needs
20 to be able to query your expert about their
21 methodologies above and beyond what they read in
22 the document.

23 MR. SNYDER: I would respectfully submit
24 that that's not the way the Federal Rules treat
25 expert discovery precisely for the reason I said,

1 that it's either simultaneous exchange of reports,
2 sequential exchange responsive reports, which is
3 what I'm proposing, followed by depositions, for
4 the precise purpose that the drafters of the rule
5 want to avoid the kind of surprise and inefficiency
6 that will result if our experts have to rebut
7 expert -- because his deposition questions will be
8 substantially informed by consultation with
9 experts, who then will prepare a report.

10 And so, it would be anomalous for him to take
11 our depositions and contrary to the Federal Rules
12 of Evidence dealing with experts to take our
13 expert's deposition without first giving us the
14 report. This is -- in every case a plaintiff can
15 say well, I want to test the defendant's expert's
16 methodology, we can't put it in a report yet. But
17 that's not what the expert rules provide for. They
18 just -- and -- and it would be very unfair for any
19 of the experts.

20 THE COURT: If we do that, it's going to
21 be a very elongated process.

22 MR. SNYDER: I don't think so, not
23 particularly.

24 MR. BOLAND: Your Honor, the rules also
25 contemplate full fact discovery before the experts

1 have done what he describes. We don't have that
2 here. This isn't -- he said early on this is not
3 the normal case. Now all of a sudden when it
4 conveniences them, it's the normal case, do the
5 normal thing.

6 This is not the normal case. They agreed to
7 give us the reports. We've had no fact discovery,
8 and you're giving us this opportunity to depose
9 their experts. I think it's eminently fair given
10 how one side of the discovery has been thus far. I
11 don't think there's anything unfair about it at
12 all. I think in Mr. Snyder's world we just should
13 get nothing and just walk out of here and every
14 client he represents should have the same result.

15 THE COURT: Well --

16 MR. SNYDER: Your Honor, we're simply
17 saying that in the most efficient and fair way is
18 for them to give us their expert reports, for
19 expert depositions on both sides to proceed, and
20 then --

21 THE COURT: And then what?

22 MR. SNYDER: And then they'll file their
23 opposition, and we will file our reply in the
24 ordinary course. And we can do it as expeditiously
25 as your Honor wishes. You know, we have no

1 interest in -- in delay here at all. I mean, as we
2 said in our reply papers, we're happy to have
3 expert depositions. We invite a bigger record on
4 the fraud. The more evidence of fraud in the
5 record, the better. We think it's -- obviously we
6 respect your Honor's ruling. I put it in the reply
7 paper because I thought your Honor might rule a
8 deposition.

9 THE COURT: Well, I am inclined to do
10 that. I'm sort of trying to be consistent. I
11 raised the issue myself back in December.

12 MR. SNYDER: Sure.

13 THE COURT: And here we are now where we
14 have to proceed. All I'm looking for is an
15 efficient way to get to the opposition papers.

16 MR. SNYDER: They wanted six months for
17 something, so they were prepared to live with six
18 months. We can live with three, six months. So if
19 they want to have 60 days to file their expert
20 reports, 60 days for depositions, that's 120 days,
21 that's -- how many months is that? That's only
22 four months. They can put in their opposition in a
23 month, that's five months. We'll put in our reply
24 in three weeks or a month, that's six-month period.
25 The whole thing will be submitted to your Honor.

1 THE COURT: And then when will you do
2 their depositions?

3 MR. SNYDER: If we think that anything is
4 pertinent for our reply papers, we'll put them in
5 our reply papers. And your Honor then will have an
6 even bigger and better record of fraud than your
7 Honor has now. I have every confidence in the
8 world that that will be the result. It will just
9 be justice a little bit delayed.

10 And if your Honor believes that expert
11 discovery is necessary, I think the cost to the
12 system, and, frankly, to us, is that extra time.
13 Because there's no way to short circuit 12
14 depositions. And I don't think we can short
15 Circuit giving us their reports. That's just not
16 fair, and it is contrary to the Federal Rules
17 governing experts. And so we're happy to, again,
18 augment the record concerning the fraud. The only
19 cost is a little more delay, but they were prepared
20 to do six months of some kind of discovery. So
21 we'll -- we can even do it quicker than that if
22 your Honor wanted. We would do depositions in 45
23 days. We can do depositions in 30 days.

24 THE COURT: I don't know, is that
25 realistic for you, Mr. Boland?

1 MR. BOLAND: I don't think so, your Honor.
2 And I think that this fairness that Mr. Snyder
3 keeps talking about, it eludes him that this case
4 -- and the Court has been eminently fair to the
5 defendants and to the plaintiffs in what was agreed
6 to by Mr. Lake prior to us coming on the case.

7 There is no unfairness to them having agreed to
8 have given us their expert reports, and now we get
9 to depose their experts. They want to dismiss my
10 client's entire claim with no fact discovery. It's
11 hardly unfair to let us depose their experts, and
12 after that deposition when they see all the holes
13 in their expert's analysis, and approaches, and
14 whether they're even valid experts and Daubert
15 qualified, they can respond with whatever they
16 think is appropriate that they need another
17 opportunity to supplement the report to sort of
18 rehabilitate them, let them do that. That's fine.

19 But to say it's unfair that they've had
20 one-sided discovery, they've had all the fact
21 evidence, and now they also get to see our expert
22 reports, which we can't complete until we hear what
23 the basis is for some of the conclusions in these
24 expert reports, which, frankly, our experts can't
25 even anticipate, because some of them are so

1 outside the field of what those experts do, they
2 have no idea the basis of some of those conclusions
3 in there, because no other expert in their field
4 has come up with those kinds of conclusions. It's
5 just -- it's not doable for them. They're going to
6 say I don't know what to put in this report to
7 approach that, because I don't know what his data
8 is that backs up the facts.

9 MR. SNYDER: Your Honor, there's not been
10 one-sided discovery. Their experts and the
11 plaintiff had access to the same Work for Hire
12 document StreetFax contract and backdated and other
13 manipulated files that our experts have had.
14 They've had it for a longer period of time than
15 we've had. And if they were content to have six
16 months of discovery, all we're proposing is take
17 that six months and conform it to your Honor's
18 discovery protocols, as opposed to the discovery
19 protocol they wanted. And if -- and if Mr. Boland
20 is comfortable doing it faster, we'll do it as fast
21 as he wants. As fast as he wants, we can do it.

22 MR. SOUTHWELL: Your Honor, if I could
23 just add one point on this. You're talking about
24 not having access to what the results of the tests
25 are. Exhibit L to Mr. LaPorte's test is the

1 comparison of the concentrated 2PE results. This
2 is the data that he relies on that Mr. Boland is
3 somehow claiming we don't know until we depose him.
4 Of it's right there in the report. It's all
5 spelled out in the report.

6 MR. BOLAND: That's a cherry picked one
7 page. It's not spelled out. The PE test to begin
8 with has absolutely no data underlying its entire
9 science.

10 MR. SNYDER: There is no reason to suspend
11 the Federal Rules of Civil Procedure governing
12 expert discovery if your Honor is ordering expert
13 discovery. The rules are well considered.
14 Congress promulgated that rule after many smart men
15 and women gave commentary about how expert
16 discovery should proceed. And to -- to sidestep
17 that established, well-recognized, and fair,
18 reasonable procedure of either simultaneous
19 exchange or sequential exchange in advance of
20 depositions, again, makes no sense given that it is
21 the plaintiff here to is perpetuating the fraud and
22 comes to this court with unclean hands, given all
23 the evidence of his own misconduct.

24 And so I think that what we're asking for is --
25 is appropriate, reasonable, and in accordance with

1 standard operating procedure. And to allow him to
2 take depositions of experts while concealing from
3 us what his expert opinions are is -- there's no
4 good reason for that whatsoever. And again, we are
5 prepared to go as fast as Mr. Boland wants, if he's
6 concerned about delay, as the plaintiff.

7 MR. BOLAND: It's not argument about
8 delay. It's about fairness.

9 THE COURT: Well, I'm just trying to
10 reacquaint myself, Mr. Southwell, with the sequence
11 for deposition of experts, says if Rule 26(a)(2)(B)
12 requires a report from the expert, the deposition
13 may be conducted only after the report is provided.
14 (a)(2)(B), unless otherwise stipulated or ordered,
15 this disclosure must be accompanied by a written
16 report. Unless otherwise stipulated or ordered by
17 the court. So it's not ironclad, Mr. Snyder.

18 MR. BOLAND: It's not an abuse of
19 discretion either.

20 MR. SNYDER: Well, what's ironclad is
21 the -- as I recall from the advisory committee
22 notes is the purpose of that is to -- and behind
23 the new expert discovery rules -- they're not so
24 new anymore -- is to avoid surprise, and to provide
25 as much information to each party so that experts

1 can make informed deposition testimony, and to be
2 efficient, because otherwise you would do a
3 piecemeal --

4 THE COURT: Well, I can --

5 MR. SNYDER: -- game of gotcha, game of
6 surprise.

7 THE COURT: I mean, what I'm -- what I'm
8 concerned about is we're going to have this
9 elongated process where there's going to be
10 rebuttal report, then there's going to be a
11 surrebuttal report based on deposing their experts.
12 It's going to go back and forth, back and forth.

13 MR. SNYDER: No, your Honor, it won't be.
14 No. No. No. There will be a period, they'll
15 give us the report. We will have expert
16 depositions. They'll file their opposition brief
17 and attach whatever they want to attach to it. We
18 will file our reply brief and attach whatever we
19 want to attach to it. Whether it's another report,
20 whether it's a deposition testimony. We would be
21 doing that in any event, that is filing an
22 opposition brief or reply brief --

23 THE COURT: No, my point is we're going to
24 get a report from them, then there's going to be a
25 deposition of your experts.

1 MR. SNYDER: Yes.

2 THE COURT: Then there's going to be
3 another report.

4 MR. SNYDER: Maybe not.

5 MR. BOLAND: Absolutely.

6 MR. SNYDER: No, your Honor. My hope
7 would be -- my hope to, your Honor --

8 THE COURT: Yeah.

9 MR. SNYDER: -- is that my expert
10 witnesses, all of them, will address on the record
11 everything they need to address when confronted
12 with the report that their expert has.

13 THE COURT: In their opposition papers, I
14 see.

15 MR. SNYDER: And if in our opposition
16 papers we need to submit an affidavit saying Romano
17 from RIT wants to address these three issues,
18 here's a two-page affidavit. It's efficient. And
19 giving the Court the best information.

20 THE COURT: It's going to take a lot of
21 time.

22 MR. BOLAND: It's efficient with no
23 cross-examination to an affidavit either. So how's
24 that -- that's strike on fairness.

25 THE COURT: Well, we've got to move

1 forward here. So we'll give you two months to file
2 your expert reports that you intend to rely on in
3 opposing the plaintiff's -- the defendant's motion
4 to dismiss. And we will give you two months within
5 which to schedule depositions and conduct
6 depositions of the defendant's experts, that is to
7 say, those who have filed reports in defendants'
8 motion to dismiss.

9 We will then give you two additional months
10 Mr. Snyder, in which to file the plaintiff's
11 opposition to the motion to dismiss, correct?

12 MR. SNYDER: Well, two months for
13 Mr. Boland.

14 THE COURT: Yes.

15 MR. SNYDER: The one question I had, your
16 Honor, where do --

17 THE COURT: That's what I'm trying to get
18 to here.

19 MR. SNYDER: What I thought --

20 THE COURT: What I'm not still clear about
21 is, do you need to depose them --

22 MR. SNYDER: Yes.

23 THE COURT: -- before --

24 MR. SNYDER: Yes.

25 THE COURT: -- the plaintiff's opposition

1 papers are filed?

2 MR. SNYDER: Yes. I think that all the
3 deposition, expert deposition should be closed
4 within two months. We can do them all in two
5 months. And then they file their opposition, and
6 we file our reply.

7 THE COURT: All right. So here we go.
8 The plaintiff's expert will file their reports
9 opposing -- in opposition to the defendants' motion
10 to dismiss, and then within the following two-month
11 period both parties may depose each other's
12 experts.

13 MR. SNYDER: Yes, your Honor.

14 THE COURT: Mr. Boland?

15 MR. BOLAND: Yes, your Honor. Sixty days
16 is fine.

17 THE COURT: All right. And then following
18 the close of expert depositions, the plaintiff
19 shall file its opposition to defendants' motion to
20 dismiss. And then within 30 days the defendant may
21 file its reply.

22 MR. DUMAIN: Your Honor --

23 THE COURT: Two months. Two months after
24 the close of expert depositions the plaintiff shall
25 file his opposition to defendants' motion to

1 dismiss. Defendant shall file a reply within 30
2 days thereafter.

3 MR. SNYDER: That's fine, your Honor.

4 THE COURT: Oral argument at the Court's
5 discretion.

6 MR. DUMAIN: I just have one question,
7 your Honor. I don't at all question your Honor's
8 right to change your mind, but is that what just
9 happened? Because everything you said before that
10 seemed to indicate that you would allow us to take
11 the depositions of their experts before --

12 THE COURT: I changed my mind.

13 MR. DUMAIN: Okay.

14 THE COURT: I'm trying to keep this as --
15 what's the word I'm looking for? Non-controversial
16 as possible. And I'm concerned that if I do what I
17 thought made sense in terms of a timetable, that I
18 might get some sort of an appeal, and then I got a
19 district judge turning me around, and I've got to
20 do this all over again. So I'm just a little
21 sensitive about that. And I want to make sure that
22 this thing goes along reasonably fairly and
23 smoothly, even though it's going to take a little
24 more time than I perhaps would prefer.

25 MR. DUMAIN: I understand that, your

1 Honor. But everything else that has happened up to
2 this point has been out of the ordinary. And so,
3 to suddenly -- when they produce their expert
4 reports first, and when they had all the discovery
5 they wanted, and we had no discovery of things that
6 we say we need to respond to the motion to dismiss,
7 to suddenly say, well, we're going to turn it into
8 an ordinary schedule, I do think is unfair, your
9 Honor, but I understand your Honor's point.

10 THE COURT: Well, I think it's not ideal,
11 and I'm just trying to avoid unnecessary issues,
12 shall we say. And he's quite right that the
13 general practice as you all well know is that those
14 expert reports get filed. If he's concerned about
15 some sort of the, you know, surprise, I just don't
16 want to have that issue creep into this litigation
17 at this time.

18 MR. DUMAIN: The general practice --

19 THE COURT: I don't see any prejudice to
20 your side to require your experts to file some
21 reports at this point.

22 MR. DUMAIN: May I ask two other brief
23 questions, your Honor?

24 THE COURT: Sure.

25 MR. DUMAIN: Do you also contemplate, your

1 Honor, the exchange of document discovery that
2 typically is done with expert discovery, like the
3 documents that they based their opinions on?
4 Because deviating from that --

5 THE COURT: That's already been revealed.

6 MR. DUMAIN: Well, if it has, they'll have
7 nothing more to produce.

8 THE COURT: What's that?

9 MR. DUMAIN: If it has, they'll have
10 nothing more to production. But certainly expert
11 depositions without the normal expert written
12 discovery under Rule 26 deviates from the norm,
13 your Honor.

14 MR. SNYDER: Everything they relied on we
15 got from their computers and --

16 THE COURT: I thought it was fairly well
17 understood that what the basis of the defendants'
18 experts opinions were. Basically it is what it is
19 as stated in this record, pretty definitively and
20 under oath. Don't you think?

21 MR. DUMAIN: I think then they'll have
22 nothing else to produce.

23 THE COURT: Well, you want sort of like a
24 safety mechanism here just in case there was
25 something that they relied on that they didn't

1 reveal?

2 MR. DUMAIN: Well, as we're discussing it,
3 why don't we deal with that if something comes up
4 in the deposition, we'll deal with it.

5 THE COURT: I was going to say that seems
6 to me -- again just in the interest of time,
7 Mr. Dumain --

8 MR. DUMAIN: That's fair. The only
9 request I wanted to make, your Honor, and I don't
10 even if there's objection to it. From what I read
11 in the press, I think Facebook has given the
12 Harvard emails to the press. They haven't given
13 them to us.

14 THE COURT: I meant to ask that. I'm
15 getting a little off, mix and matching here. But I
16 wanted to ask, and I know this is a little off the
17 point about the schedule. Based on the
18 supplemental declarations that I ordered pursuant
19 to granting your motion -- your sixth motion
20 perhaps for -- to compel, that it was my
21 perception, perhaps erroneously, that the plaintiff
22 was now in compliance with the August 18th order,
23 thus triggering the obligation of the defendants to
24 provide to the plaintiff the so-called Harvard
25 emails that you've been carrying around in your

1 vest pocketing in a CD all these many months,
2 Mr. Snyder.

3 MR. SNYDER: Right. Again, like the
4 motion to dismiss, we had hoped to produce those
5 emails in September and move to dismiss, and I
6 think we're close.

7 THE COURT: What is that he owes you?

8 MR. SNYDER: There's one area where --
9 and, again, often when there's obstruction or
10 equivocation, there's something lurking that is
11 important, if not dispositive, as in the case of
12 the StreetFax contract. So the one -- one area is
13 he's not complied with his duty to effectively
14 facilitate the acquisition of a webmail account for
15 the so-called Hush mail email account, which is a
16 Canadian-based encrypted web provider, and --

17 THE COURT: Did I not address that?

18 MR. SNYDER: You did, but they have not --
19 what they did in the past is kind of not fill out
20 the forms correctly, give us incomplete
21 information, and it has taken a while to acquire
22 each webmail account. We still haven't acquired
23 the Hush mail account yet. As soon as we do --

24 THE COURT: Well, is that because of any
25 fault on his part not complying.

1 (Indiscernible cross-talk).

2 THE COURT: One at a time. One at a time.

3 MR. SOUTHWELL: Your Honor, this is -- we
4 had some back and for with Hush mail about the form
5 of the consents that Mr. Ceglia filled out.

6 THE COURT: Yeah. Right.

7 MR. SOUTHWELL: And thanks, your Honor,
8 for clarifying it. And so we're now waiting for
9 the results of Hush mail based on Mr. Boland's last
10 provision of the consent and whether Hush mail will
11 accept that form. As soon as we know that they
12 will accept it and we get the contents, we'll know
13 that he has facilitated access.

14 THE COURT: But hasn't he done exactly
15 what you told him to do?

16 MR. SNYDER: We don't know.

17 MR. SOUTHWELL: No. He did whatever --
18 Hush mail is the one that decides what
19 requirements --

20 THE COURT: Is this a moving target by the
21 provider?

22 MR. SOUTHWELL: We have conveyed what Hush
23 mail said. He has not done exactly what Hush mail
24 asked for. He's explained to Hush mail why he
25 didn't do that. It has to do with they requested

1 that Mr. Boland execute a declaration that
2 Mr. Ceglia was declaring it in his presence. And
3 Mr. Boland explained he wasn't able to do that. We
4 have not yet heard. I've inquired of Hush mail as
5 to whether this is acceptable. They have not told
6 us whether it is acceptable yet. So we're almost
7 there.

8 THE COURT: That was not part of the
9 motion, that particular point.

10 MR. SOUTHWELL: Well, it was -- Mr. Ceglia
11 has an obligation to facilitate access to --

12 THE COURT: No, but you specified exactly
13 what it was that he had not done. I directed him
14 to do it.

15 MR. SOUTHWELL: Right.

16 THE COURT: He did it.

17 MR. SOUTHWELL: That was to provide a
18 consent. He provided a consent, but it was not
19 sufficient.

20 THE COURT: Which we learned after the
21 motion was filed.

22 MR. SOUTHWELL: Correct.

23 THE COURT: So we have a new issue.

24 MR. SOUTHWELL: And we're hoping that we
25 can resolve it, and that we should know -- again,

1 that we should know. If mr. Ceglia was here in the
2 United States it would be easy for him to sign it
3 in front of Mr. Boland and it would be a nonissue,
4 but --

5 THE COURT: How about a video conference,
6 would they accept that?

7 MR. SOUTHWELL: I was hoping, your Honor,
8 that we could simply resolve it with Mr. Boland
9 hopefully in the next few days.

10 THE COURT: But Mr. Ceglia is not -- he's
11 not noncompliant with my order at this point, is
12 he?

13 MR. SOUTHWELL: We don't know. We don't
14 know because they have not said he's in compliance,
15 and so we're waiting for that confirmation that
16 he's compliant before we know that he's in
17 compliance, and that he's do not what needs to do
18 to facilitate access, which was what your Honor had
19 required. We think we're very close, and as soon
20 as that occurs, we'll --

21 THE COURT: Okay. So that's the answer,
22 Mr. Dumain, I guess.

23 MR. BOLAND: Your Honor, can I correct the
24 record, your Honor? Mr. Ceglia is completely in
25 compliance. He got a consent form. He did

1 everything in his power and signed it, so did I,
2 and we sent it to this Canadian company. It is not
3 a feature of his noncompliance because a Canadian
4 email company is not satisfied with everything that
5 he can provide in that document. That's just not
6 accurate. He's totally in compliant now, and if
7 that company decides they don't like the form of
8 information he provided, even though he provided
9 everything they requested, that's not
10 noncompliance.

11 THE COURT: But -- and you will cooperate
12 in providing a new form.

13 MR. BOLAND: Absolutely.

14 THE COURT: Absolutely.

15 MR. BOLAND: Every form --

16 THE COURT: But you want the Harvard
17 emails?

18 MR. BOLAND: Pardon me?

19 THE COURT: You'll want that CD that
20 Mr. Snyder has got in his vest pocket.

21 MR. BOLAND: We don't want it. The Court
22 ordered him to give it to us. So we want you --

23 THE COURT: You don't want it, I'm sure
24 he'll be happy not to give it to you.

25 MR. BOLAND: They ordered to provide it,

1 that's what they're saying.

2 THE COURT: I know.

3 MR. BOLAND: It's a little bizarre they
4 provide it to the press before us.

5 THE COURT: That I don't know about, and
6 it would be surprised if that happened.

7 MR. SNYDER: Again --

8 MR. BOLAND: That's just par for the
9 course.

10 MR. SNYDER: Mr. Boland asserts facts as
11 an officer of this court without any good-faith
12 basis to believe that. What he just told your
13 Honor is a lie. It's not true.

14 THE COURT: He didn't say it. Mr. Dumain
15 said it.

16 MR. SNYDER: Well --

17 MR. BOLAND: The press is saying they got
18 they two emails from the defendants. Harvard
19 emails got sent to them. So that's a good-faith
20 basis. They relied on the press in their motion,
21 so we can too.

22 MR. SNYDER: We attached emails to our
23 motion to dismiss. Those are in the public record.
24 And the press has read those emails that are in the
25 public record, as anyone accessing the public

1 record can. So we did not give the press the CD
2 that I've been holding since September to give to
3 Mr. Lake had Mr. Ceglia not obstructed discovery.

4 THE COURT: All right.

5 MR. SNYDER: It's not true.

6 THE COURT: If I can cut the Gordian knot
7 here, I find that the plaintiff is substantially in
8 compliance with its obligation under the August
9 18th order as regard these email accounts, and I
10 direct that the defendants provide him with the
11 reciprocal discovery to which they're entitled
12 forthwith.

13 MR. SNYDER: Happy to do so.

14 MR. BOLAND: Very well.

15 THE COURT: What else, Mr. Dumain?

16 MR. DUMAIN: Nothing else. Thank you very
17 much, your Honor.

18 MR. BOLAND: Nothing's else, your Honor.

19 THE COURT: All right. What about the
20 motion to dismiss on statute of limitations
21 grounds? What conceivable discovery do you need to
22 fairly oppose that motion, Mr. Boland?

23 MR. BOLAND: Well, your Honor, there's a
24 lot of factual issues that can relate to when the
25 statute of limitations begins to run. Their bald

1 assertion is the moment Mr. Zuckerberg incorporated
2 something --

3 THE COURT: Well, this is the time to be
4 very specific, because if I don't hear something
5 very specific in the next five minutes, I'm going
6 to direct that you file an opposition to that
7 motion within two months after the close of expert
8 discovery.

9 MR. BOLAND: Well, your Honor, can we have
10 a short period of time to respond to that question
11 with regard -- in writing to the defendants, to the
12 court with what fact discovery and what our basis
13 is?

14 THE COURT: All right.

15 MR. BOLAND: Whatever the Court thinks is
16 reasonable, because --

17 THE COURT: I'm not saying I'm going to
18 give you any. All I said in December was that
19 considerations of fairness, given the magnitude and
20 complexity of the case sort of triggered in my mind
21 a need to have expert discovery. I wouldn't even
22 have to do that. You didn't like what you get, you
23 can appeal to the district judge. But I've decided
24 to go down that path because I'm now persuaded that
25 you're still entitled to that, as I thought you

1 might be in December, notwithstanding the plethora
2 of information and the appearance of competency of
3 the defendants' experts.

4 But as to the statute of limitations issue and
5 the laches issues -- by the way, they say that
6 laches is inapplicable here because it's a money
7 judgment request, Mr. Snyder. There was no mention
8 of that in your reply. They say that laches is
9 unavailable to you, because this is a money
10 judgment request, and laches is only available in
11 an equitable relief. You didn't address that in
12 your reply. You want to address that in a
13 supplemental reply?

14 MR. SNYDER: Yeah.

15 THE COURT: Okay. Fine, you do that, then
16 I'll give them a chance to respond. But on the
17 concept of -- obviously we don't need, I think,
18 expert discovery or disclosures or anything else or
19 opinions on whether or not there's a valid statute
20 of limitations slash laches defense that requires
21 dismissal, I'm wanting to hear from you why you
22 need any fact discovery beyond what's already in
23 this record on these motions. That's also
24 available to you to fairly oppose that motion.

25 MR. BOLAND: Yes, your Honor. That's what

1 I was requesting before. I wasn't clear.

2 THE COURT: And you feel like you need
3 additional time. It's late. We've been at it now
4 for quite a long time. And you'd like an
5 opportunity to further brief have that?

6 MR. BOLAND: Yes, your Honor, a brief that
7 lays out why we feel we need factual discovery on
8 those legal issues.

9 THE COURT: What fact discovery you need
10 specifically.

11 MR. BOLAND: And what fact discovery we
12 believe we need we'll tie it in to the issues.

13 THE COURT: Okay.

14 MR. BOLAND: And I think that's
15 reasonable.

16 THE COURT: You can provide that within
17 what time?

18 MR. BOLAND: Seven days, your Honor.

19 THE COURT: Seven days?

20 MR. SNYDER: May I address that form a
21 minute, your Honor? Because we've been subjected,
22 as your Honor knows from the one sanctions motion
23 that was granted to an inordinate amount of
24 litigation as a result of this fraudulent act of
25 filing the lawsuit.

1 We respectfully submit that under Rule 12(c) the
2 proper procedure is for -- instead of having more
3 multiple layers of briefing upon briefing, is for
4 this plaintiff to file in the ordinary course an
5 opposition to our motion under Rule 12(c). If in
6 that opposition, which is addressed to the face of
7 the pleading he thinks he needs discovery, I don't
8 even know -- I guess that argument is --

9 THE COURT: I guess technically that you
10 refresh me that it's 12(c) there really wouldn't be
11 any discovery.

12 MR. SNYDER: No, your Honor. So our
13 position is that if the Court believes that on the
14 face of the pleading and facts in the public record
15 or facts as to which the Court permissibly can take
16 judicial notice, there is an insufficient basis in
17 law to dismiss on the pleadings, your Honor will
18 deny that motion, and we'll either -- and that will
19 be the end of it. But to have briefing on why
20 there should be discovery under Rule 12(c) we think
21 is inept.

22 THE COURT: Doesn't he have a point there,
23 Mr. Boland, now that we've focused on it a little
24 more clearly?

25 MR. BOLAND: Your Honor, we've addressed

1 this in our brief that -- that the statute of
2 limitations on Mr. Ceglia's claim is triggered
3 based on facts that aren't addressed in the
4 pleadings. We don't have --

5 THE COURT: Well, that's the argument
6 you'll make in opposition, and if we agree with
7 you, we'll deny the motion and we'll proceed on
8 that claim.

9 MR. BOLAND: But there are discovery
10 issues which -- there's some -- we'd like at least
11 the opportunity to argue that there's discovery we
12 need to address that issue. And seven days seems
13 reasonable, your Honor, to just brief that.

14 THE COURT: Yeah.

15 MR. SNYDER: Your Honor, that's their
16 opposition brief, and it's not an appropriate
17 argument to make under Rule 12, because the
18 argument is --

19 THE COURT: Look, let's do this. It's
20 already ten to five. We've really devoted a lot of
21 energy to this, and I compliment both sides for
22 their patience and their advocacy. Very helpful.
23 Let's just do that. We'll give you seven days to
24 tell me why you think you're entitled to discovery
25 to oppose that motion.

1 MR. BOLAND: Yes, your Honor. Very well.

2 THE COURT: We'll give the defendants
3 seven days, and one of the arguments first and
4 foremost will be, Judge, it's irrelevant. It's a
5 12(c) motion. Make the argument, I'll evaluate it,
6 we'll make a ruling. If we're wrong, somebody will
7 appeal, and that will be that. Otherwise, it will
8 go away as an issue. And then at that point we'll
9 direct -- if we don't permit discovery on that
10 motion, then we will probably direct that your
11 formal response to it be filed at the same time as
12 your motion to -- your opposition to the motion to
13 dismiss.

14 MR. BOLAND: Very well.

15 THE COURT: Would that be reasonable?

16 MR. BOLAND: Yes, your Honor.

17 MR. SNYDER: May I just say, your Honor,
18 for the record that every time that the plaintiff
19 seeks to impose additional costs and burden and
20 prevails upon your Honor to grant them that relief,
21 it's of vexatious multiplication of litigation for
22 which we, at the end of this case intend to hold
23 the plaintiff and all counsel fully responsible. I
24 just wanted to say that in connection with this,
25 which is, again, an exemplification of their

1 strategy here. Cause Facebook and the defendants
2 to spend more time and more money --

3 THE COURT: You can attempt to hold
4 anybody responsible for the cost of litigation that
5 you'd like, just don't include me.

6 MR. SNYDER: No, your Honor. Thank you.

7 THE COURT: Anything further on behalf of
8 the plaintiff?

9 MR. BOLAND: No, your Honor. Thank you.

10 THE COURT: Defendant.

11 MR. SNYDER: Thank you, your Honor.

12 THE COURT: We are adjourned. Have a safe
13 trip back everyone that's traveling.

14 MR. DUMAIN: Thank you.

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1 CERTIFICATION
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4 I certify that the foregoing is a
5 correct transcription, to the best of my
6 ability, from the electronic sound recording
7 of the proceedings in this matter.
8
9

10 s/Michelle L. McLaughlin
11 Michelle L. McLaughlin, RPR
12 Official Reporter
13 U.S.D.C., W.D.N.Y.
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